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Case Note

Has the Supreme Court Sacrificed Stare Decisis to Clarify Res Judicata? An "On the Merits" Evaluation of Federal Common Law Jurisprudence After *Semtek*

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I. INTRODUCTION

For those outside the practice of law, the term "on the merits" has little significance. However, the very mention of the phrase haunts those who have taken a first-year Civil Procedure course with memories of res judicata. Although determining which judgments qualify as "on the merits" may be deceptively simple at first blush, many students spend a good part of the semester chasing this elusive concept. While frustrating to first-year law students, the precise definition of "on the merits" has even escaped the grasp of legal scholars.[1]

Under the doctrine of res judicata, a prior valid final judgment may bar parties to a previous action from re-filing the same claim at another time or in another court.[2] However, in order for a judgment to be given claim-preclusive effect, it must be classified as an adjudication upon the merits.[3] This distinction ensures that only cases reaching the substantive merits of the parties' claims are given claim-preclusive effect.[4] Because it is difficult to ascertain whether or not a judgment is "on the merits," questions arise when courts seek to determine whether actions before them between similar parties are barred by res judicata.

Until recently, one of the easiest categories of judgments to classify as being "on the merits" was a dismissal of a claim by a federal district court. The Federal Rules of Civil Procedure directly address such a dismissal: "Unless the court in its order

1. Some publications have chosen to avoid using the term altogether. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a (1982) [hereinafter RESTATEMENT] ("Although [judgments entitled to preclusive effect] are often described as 'on the merits' or as 'operating as an adjudication on the merits,' that terminology is not used here in the statement of the general rule *because of its possibly misleading connotations*.") (emphasis added).

2. *See id.* § 17.

3. Along with finality and validity, a decision on the merits is required for a prior judgment to have claim preclusive effect. *See, e.g.*, Cromwell v. County of Sac, 94 U.S. (4 Otto) 351, 352 (1876) ("[A valid, final] judgment, if rendered *upon the merits*, constitutes an absolute bar to a subsequent action.") (emphasis added); *see also* Jay C. Carlisle, *Second Circuit 1999-2000* Res Judicata *Developments*, 20 QUINNIPIAC L. REV. 75, 75 n.2 (2000) ("After a final judgment on the merits rendered by a court of competent jurisdiction, *res judicata* bars subsequent litigation between the same parties and those in privity with them involving the same cause of action.") (citation omitted).

4. *See County of Sac*, 94 U.S. (4 Otto) at 352.

for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19 . . . operates as an adjudication on the merits."[5] Rule 41(b) created a default rule: Unless the dismissal order specifically stated otherwise, or fell into one of the three listed categories, the dismissal would be considered "on the merits." Naturally, one would logically conclude such a dismissal under Rule 41(b) would be given claim-preclusive effect. That was the case until February 2001, when the Supreme Court decided *Semtek International, Inc. v. Lockheed Martin Corp.*[6]

In *Semtek*, the Court granted *certiorari* to determine the claim-preclusive effect of a federal court dismissal on statute of limitations grounds. Semtek, the plaintiff in the action, originally filed suit on breach of contract and business tort theories in California state court.[7] Lockheed removed to federal court on diversity of citizenship grounds and moved to dismiss because California's two-year statute of limitations barred the suit.[8] The district court granted the motion and dismissed Semtek's claims "in [their] entirety on the merits and with prejudice."[9] The Court of Appeals for the Ninth Circuit affirmed the dismissal.[10] Semtek then re-filed the suit in Maryland state court, where the Maryland three-year statute of limitations allowed the claims.[11] Lockheed, a Maryland corporation, removed to federal district court on federal question grounds, claiming the dismissal of the action by the California federal court barred the current action under both the doctrine of res judicata and Rule 41(b).[12] The federal district court declined jurisdiction and re-

5. FED. R. CIV. P. 41(b). *See also* RESTATEMENT, *supra* note 1, § 19 cmt. b.

6. 531 U.S. 497 (2001).

7. *Id.* at 499.

8. *Id.*

9. *Id.* The statute of limitations dismissal was considered "on the merits" for two reasons. First, it fell within the default rule of Rule 41(b) because it was not a dismissal for lack of jurisdiction, improper venue, or failure to join a party. Second, the federal district court specifically stated the dismissal was "with prejudice" and "on the merits." Standing alone, either would create a claim-preclusive dismissal under Rule 41(b). *See supra* note 5 and accompanying text.

10. *Semtek,* 531 U.S. at 499.

11. *Id.*

12. *Id.* at 500.

manded the action back to the Maryland state court.[13] Lockheed's request to the California federal district court for injunctive relief was also fruitless.[14]

Citing Rule 41(b), Lockheed successfully moved the Maryland state court for dismissal on grounds of res judicata.[15] Shortly thereafter, the Ninth Circuit rejected Semtek's appeal to amend the California federal court order to remove the "on the merits" and "with prejudice" distinctions.[16] After reemphasizing the clear language of Rule 41(b), the Maryland Court of Special Appeals affirmed the trial court decision, holding "[t]he earlier dismissal of the suit by the [California federal district court] was a judgment on the merits and was entitled to the preclusive effect that [the trial judge] gave [to] it."[17] Semtek appealed.

13. Semtek Int'l, Inc. v. Lockheed Martin Corp., 988 F. Supp. 913, 914 (D. Md. 1997). Generally speaking, for a federal court to have subject matter jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), a federal question must be a necessary element of the plaintiff's complaint. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908). Here, federal question jurisdiction did not exist because the federal issue (the claim-preclusive effect of a federal diversity dismissal) was not a necessary element of Semtek's complaint—it arose only as an affirmative defense by Lockheed.

14. *Semtek*, 531 U.S. at 499–500.

15. *Id.* at 500. *See also* Semtek Int'l, Inc. v. Lockheed Martin Corp., 736 A.2d 1104, 1107 (Md. Ct. Spec. App. 1999) (reporting the language of the Maryland trial court: "The central issue that this court has been asked to consider is the preclusive effect of a federal dismissal on a subsequent identical state court action. . . . Pursuant to the clear language of the Federal Rules of Civil Procedure . . . federal law determines the preclusive effect of a prior federal judgment.").

16. Semtek Int'l, Inc. v. Lockheed Martin Corp., No. 97-55840, 1999 U.S. App. LEXIS 3150 (9th Cir. 1999). Even if the Ninth Circuit had granted Semtek's motion, it is unclear whether that alone would have surmounted Lockheed's res judicata defense to the current action in Maryland state court. The clear language of Rule 41(b) would still qualify the original California federal court decision as "on the merits."

17. Semtek Int'l, Inc. v. Lockheed Martin Corp., 736 A.2d 1104, 1121 (Md. Ct. Spec. App. 1999), *cert. denied*, 742 A.2d 521 (Md. 1999).

Relying on the *Erie* doctrine,[18] a unanimous Supreme Court rejected the plain meaning of Rule 41(b).[19] Semtek argued Rule 41(b) should be construed consistent with the Supreme Court's decision in *Dupasseur v. Rochereau*,[20] which required "that the *res judicata* effect of a federal diversity judgment 'is such as would belong to judgments of the State courts rendered under similar circumstances.'"[21] Under California law, dismissal on statute of limitations grounds would not bar filing the identical action in a different state where the limitations period had not yet expired.[22] Therefore, adoption of the *Dupasseur* rule would strip the original dismissal of Semtek's claims of its claim-preclusive effect, allowing the current action in the Maryland state court to proceed.

The Court rejected Semtek's claim that *Dupasseur* was controlling because it was decided under the since-repealed Conformity Act of 1872,[23] requiring federal courts to use state

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18. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution of by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."). *Erie* and its progeny comprise what is popularly known as the *Erie* Doctrine. The *Erie* doctrine is discussed in notes 39 to 57, *infra*, and accompanying text.

19. Semtek Int'l, Inc. v. Lockheed Martin Corp, 531 U.S. 497, 501–04 (2001) ("Implicit . . . is the unstated minor premise that all judgments denominated 'on the merits' are entitled to claim-preclusive effect. That premise is not necessarily valid. . . . Moreover, as so interpreted, the Rule would in many cases violate the federalism principle of *Erie R. Co. v. Tompkins* . . . by engendering 'substantial variations [in outcomes] between state and federal litigation' which would '[l]ikely . . . influence the choice of a forum.'") (citations omitted).

20. 88 U.S. (21 Wall.) 130 (1874).

21. Brief for the petitioner at 8, Semtek Int'l, Inc. v. Lockheed Martin, 531 U.S. 497 (2001) (No. 99-1551) (citation omitted).

22. *See, e.g.*, Koch v. Rodlin Enter., 273 Cal. Rptr. 2d 438 (Cal. Ct. App. 1990) (holding dismissal of an action on statute of limitations grounds does not preclude subsequent actions under California law on res judicata); *see also* 40 CAL. JUR. 3D Judgments § 131 (1995) ("A summary judgment granted on grounds that are not on the merits, such as that the action is barred by the statute of limitations, does not act as res judicata.").

23. 17 Stat. 196 § 5 (1872) ("That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held . . . .").

procedural rules in nonequity cases.[24] The Court had decided over one hundred years of choice-of-law decisions since Congress passed the Conformity Act. Most notably, *Erie* and its progeny forever changed the way federal courts make choice-of-law decisions. However, the *Semtek* Court upheld the rule of *Dupasseur* by creating federal common law to reach the same result:

> In other words, in *Dupasseur* the State was allowed (indeed, required) to give a federal diversity judgment no more effect than it would accord one of its own judgments only because reference to state law was *the federal rule that this Court deemed appropriate*. In short, federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.
>
> It is left to us, then, to determine the appropriate federal rule. And despite the sea change that has occurred in the background law since *Dupasseur* was decided—not only [the] repeal of the Conformity Act but also the watershed decision of this Court in *Erie*—we think the result decreed by *Dupasseur* continues to be correct for diversity cases.[25]

Since the *Erie* decision in 1938, the Supreme Court has decided numerous cases either approving or rejecting the use of federal common law.[26] A study of the *Semtek* decision provides a vehicle through which modern jurists can examine the vitality of federal common law with an eye towards its underlying policy considerations. To that end, this article critically examines the *Semtek* decision within the realm of the Supreme Court's federal common law jurisprudence. Section II gives an historical overview of federal common law, noting the many policy considerations that factor into its creation.[27] Section III discusses tests and factors the Court has previously enunciated in determining whether or not to create federal common law.[28] Finally, Section IV attempts to reconcile *Semtek* with the aforemen-

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24. *Semtek*, 531 U.S. at 500–01.

25. *Id.* at 508 (citations omitted) (emphasis in original).

26. *See, e.g.*, *Semtek*; Atherton v. Fed. Deposit Ins. Corp., 519 U.S. 213 (1997); Boyle v. United Techs. Corp., 487 U.S. 500 (1988); United States v. Kimbell Foods, 440 U.S. 715 (1979); United States v. Yazell, 382 U.S. 341 (1966); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447 (1942).

27. *See infra* notes 30–94 and accompanying text.

28. *See infra* notes 95–133 and accompanying text.

tioned tests and factors.[29] Because the *Semtek* Court departs from its most recent federal common law jurisprudence, Section IV also evaluates whether the Court has returned to less stringent standards for the enactment of federal common law.

II. THE HISTORY OF FEDERAL COMMON LAW AND THE POLICY CONSIDERATIONS INHERENT IN ITS CREATION

Common law is defined as "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions."[30] Federal common law involves the common law created by federal courts.[31] Federal common law differs greatly from traditional notions of common law because a federal court's creation of common law raises both federalism and separation of powers concerns. Aside from the concerns accompanying the creation of federal law absent Congressional act, the application of federal common law to areas outside the scope of federal authority infringes upon the law-making authority of the several states. Because of these competing concerns, the history of federal common law is replete with policy considerations weighing federal courts' power to create common law against concerns of federalism and separation of powers.

These dual concerns are also evident when examining Congress' administration of the inferior federal courts. Pursuant to its power to establish inferior federal courts,[32] Congress enacted the Judiciary Act of 1789;[33] section 34 of which contained the Rules of Decision Act. The Rules of Decision Act required that federal courts apply the substantive law of the several states unless they were otherwise directed by Congress.[34]

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29. *See infra* notes 134–47 and accompanying text.

30. BLACK'S LAW DICTIONARY 270 (7th ed. 1999).

31. *See id.*

32. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* U.S. Const. art. I, § 8, cl. 9 (giving Congress the power to "constitute tribunals inferior to the Supreme Court").

33. 1 Stat. 73 § 35 (1789). For the history and legislative intent of the Judiciary Act on 1789, *see generally* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE (1990).

34. *See* 1 Stat. 73, 92 (1789). The principles of the Rules of Decision Act are still codified in the United States Code. *See* 28 U.S.C. § 1652 (2001) ("The laws of

In 1842, the Supreme Court held in *Swift v. Tyson*[35] that the Rules of Decision Act did not preclude federal courts from creating common law in areas even outside the federal area of competence. The Court found the Act was limited to statutory law, and, therefore, did not include common law created by state courts.[36] After *Swift*, federal courts had broad power to create what would later come to be known as "general law" or "general federal common law" in addition to their common law-making powers. General law differed from federal common law because, although both were created by federal courts, general law referred to common law outside the scope of federal competence.[37] Aside from the federalism principles discussed below, application of the general law proved troublesome on many grounds. Essentially, some courts viewed the general law as a third body of law; a decision made by a federal court invoking the general law was not necessarily decided upon federal law.[38]

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the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply.").

35. 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

36. *Id.* at 18–19.

37. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75–76 (1938) (describing the far reach of the federal general common law):

> The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the State, the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the State upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the State; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded.

38. For example, when the Supreme Court evaluated *certiorari* petitions from state court decisions for independent federal grounds of decision, it refused to hear cases decided upon an independent ground of either state or general law. Before *Erie* was decided in 1938, the Supreme Court noted this distinction by refusing appellate review to state cases decided upon independent, "non-federal" grounds. *See, e.g.*, Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other *non-federal* in character, our jurisdiction fails if the *non-federal ground* is indepen-

A. *Federalism Concerns and the* Erie *Decision*

After *Swift*, the scope of federal common law was broad and far-reaching, going significantly beyond the Constitutional scope of federal powers.[39] Federal courts created common law in areas in which Congress lacked authority to enact statutory law.[40] Under *Swift*, there was no longer parity between a forum state's courts and a federal court sitting in diversity within that forum state.[41] Whether state or federal substantive law applied to a decision depended on where the plaintiff filed the case: "Before *Erie*, . . . suing in a state court usually meant that state law would apply to key issues in a case and suing in federal court meant that federal common law would apply, choice of forum was often equivalent to choice of result."[42]

Perhaps the most often cited illustration of this lack of parity is *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[43] In *Black & White*, two Kentucky-based taxi companies disputed over exclusive rights to pick up passengers at a railroad station in Bowling Green, Kentucky.[44] Brown & Yellow, which had an exclusive contract with the railroad company to pick up passengers at the station, claimed Black & White was infringing upon their exclusive right to do so by competing for passengers at the station.[45] Brown & Yellow reincorporated as a Tennessee corporation to create diversity jurisdiction and sued in federal courts.[46] This allowed Brown & Yellow to avoid unfavorable Kentucky law, which would not en-

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dent of the federal ground and adequate to support the judgment.") (emphasis added).

39. *See Erie*, 304 U.S. at 76.

40. *See id.* at 72 ("The federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes."). Congressional areas of competence are enumerated in U.S. CONST. art. I, § 8.

41. Parity refers to the theory that a case filed in a federal district court sitting in diversity should reach the same outcome as an identical case filed in the state court. For an overview of parity and the policy concerns that drive it, *see* DONALD L. DOERNBERG & C. KEITH WINGATE, FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS 13–21 (2d ed. 2000).

42. *Id.* at 14.

43. 276 U.S. 518 (1928).

44. *Id.* at 522–33.

45. *Id.*

46. *Id.* at 523–24.

force their contract with the railroad, in favor of the general federal common law, which would enforce their contract:

> The Court of Appeals of Kentucky held such contracts invalid. . . . The question there decided is *one of general law*. [The Supreme] Court holds such contracts valid. And these decisions show that, without its consent, the property of a railroad company may not be used by taxicabmen or others to solicit or carry on their business and that it is beyond the power of the State in the public interest to require the railroad company without compensation to allow its property so to be used.[47]

Justice Holmes dissented in *Black & White*, arguing that federal courts should be bound by state common law within the scope of the Rules of Decision Act.[48] Even prior to *Black & White*, Justice Field highlighted the flaws in the general federal common law system in *Baltimore & Ohio R.R. Co. v. Baugh*:[49]

> I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with

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47. *Id.* at 526-27 (emphasis added) (citations omitted).

48. *Black & White*, 276 U.S. at 533-34 (Holmes, J. dissenting):

> Therefore I think it proper to state what I think the fallacy is. —The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law. By that phrase is meant matters that are not governed by any law of the United States or by any statute of the State—matters that in States other than Louisiana are governed in most respects by what is called the common law. It is through this phrase that what I think the fallacy comes in.
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> . . . If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

49. 149 U.S. 368 (1893).

> which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States.[50]

Justice Brandeis, who joined the *Black & White* dissent, cited the case with disfavor ten years later in *Erie* as one of the problems with general federal common law.[51]

In 1938, the Court adopted Justice Holmes' interpretation in *Erie*. Before overruling *Swift v. Tyson*, the *Erie* court reinterpreted the Rules of Decision Act to include common law created by the courts of the several states:

> [T]he purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.[52]

With the Rules of Decision Act freshly construed to include state common law, only questions of supremacy remained. "[W]here the Constitution, or a *valid* Act of Congress, provides a rule of decision, it must be applied by a federal court . . . ."[53] With *Erie*, the Court found that declaring rules of general common law was beyond the scope of their Constitutional power:[54] "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . be they commercial law or part of the law of torts.

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50. *Id.* at 401 (Field, J. dissenting).

51. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–74 (1938).

52. *Id.* at 72–73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923)). *But see* RITZ, *supra* note 33, at 148 (arguing that Congress intended the Rules of Decision Act to be a temporary measure to allow federal courts to adjudicate without first developing uniform rules of procedure).

53. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 412 (5th ed. 1994). A discussion of what constitutes a valid act of Congress could fill numerous volumes and is beyond the scope of this article.

54. *See supra* note 37.

And no clause in the Constitution purports to confer such a power upon the federal courts."[55]

Erie exemplified two policy objectives that would come to be known as the twin aims of *Erie*.[56] First, in removing the power to create general common law from the federal courts, the Court rectified the forum-shopping problem demonstrated by cases like *Black & White*. Second, *Erie* also sought to increase parity between federal courts sitting in diversity in a forum state and courts of that forum state.[57]

B. *Federal Common Law After* Erie

While *Erie* prevented federal courts from making *general* federal common law, it did not proscribe the use of federal common law altogether.[58] On the same day the Court decided *Erie*, Justice Brandeis wrote another majority opinion using federal common law to decide an interstate boundary dispute between two states.[59] The rules for deciding such a dispute are found neither in the Constitution nor in an act of Congress. Some cases, therefore, require "[T]he Court, of necessity, [to] . . . develop[ ] its own body of law to govern such questions, because of the obvious unsuitability of looking to the law of a particular state when two states are in dispute."[60]

Necessity aside, federal common law potentially exists in all areas of federal competence. This is what former Circuit

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55. *Erie*, 304 U.S. at 78.

56. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) ("the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws"); *see also*, John B. Corr, *Thoughts on the Vitality of* Erie, 41 AM. U. L. REV. 1087, 1124 (1992).

57. *See* DOERNBERG & WINGATE, *supra* note 41, at 14.

58. The difference is critical. *Erie* only proscribed the creation or use of *general* federal common law. In my Civil Procedure class, a student answered my professor's inquiry as to the holding in *Erie* with: "The Court said there is no federal common law." For dramatic effect, my professor banged his head repeatedly against the blackboard until the student corrected the earlier statement.

59. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (Brandeis, J.) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.") (citations omitted).

60. WRIGHT, *supra* note 53, at 411.

Judge Friendly referred to as "specialized common law."[61] Because creating such common law would be within the scope of federal powers, its creation and use would not violate the federalism principles exemplified by *Erie*. Federal courts continued making federal common law under the authority of the Constitution and federal statutes. As Justice Jackson noted in 1942:

> Federal law is no juridicial chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases . . . .[62]

Although Justice Jackson's thoughts reflect the vitality of federal common law at the time, they were not expressly stated by the Court; Justice Jackson's comments were made in concurrence. It was not until 1943 in *Clearfield Trust Co. v. United States*[63] that the Court explicitly enunciated the modern view on the proper usage of federal common law.

In *Clearfield Trust*, the Court held that federal common law governed the rights and duties of the United States on the commercial paper it issued, despite the *Erie* decision.[64] An unknown party removed a government check issued to a federal worker from the mail and used it to purchase merchandise at a department store.[65] Clearfield Trust, the department store's collection company, guaranteed the check and forwarded it to

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61. Henry J. Friendly, *In Praise of* Erie – *and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964) ("The clarion yet careful pronouncement in *Erie*, 'There is no federal general common law,' opened the door for what, for want of a better term, we may call specialized federal common law.") (footnote omitted).

62. D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 471-72 (1942) (Jackson, J. concurring).

63. 318 U.S. 363 (1943).

64. *Id.* at 366 ("[T]he rule of *Erie R. Co. v. Tompkins* does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law.") (citation omitted).

65. *Id.* at 364-65. Aside from its federal common law rule, *Clearfield Trust* is interesting because the United States government litigated the negligent payment of a check up through the United States Supreme Court. Ironically, the check was in the amount of $24.20.

the Federal Reserve Bank for payment.[66] When the Federal Reserve Bank discovered that the check was not properly payable, the United States sued Clearfield Trust for reimbursement in Pennsylvania federal district court.[67] Clearfield Trust argued that *Erie* required the case to be decided under Pennsylvania law, barring recovery because the United States delayed significantly before giving notice of the forgery to Clearfield Trust. The United States argued that under *United States v. National Exchange Bank*,[68] a case decided under the regime of *Swift v. Tyson*, the notification delay would not extinguish the remedy.

In adopting the federal common law created under *Swift*,[69] the Court cited the need for national uniformity in adjudicating such matters:

> The issuance of commercial paper by the United States is on a vast scale and . . . will commonly occur in several states. The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states.[70]

The Court used federal common law to decide the case, holding that the government's delay did not extinguish the reimbursement remedy.[71]

Clearfield Trust differed from *Erie* in a number of ways. While *Erie* dealt with substantive tort law, an area generally considered within the authority of state power, the issuance of commercial paper in *Clearfield Trust* clearly qualified as a valid exercise of federal power.[72] Because the rights and duties of the United States on its commercial paper are governed by federal

66. *Id.* at 365.

67. *Id.*

68. 214 U.S. 302 (1909).

69. *Clearfield Trust*, 318 U.S. at 367 ("And while the federal law merchant, developed for about a century under the regime of Swift v. Tyson, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.") (citation omitted).

70. *Id.* at 367.

71. *See id.*

72. *Id.* at 366 ("When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power."); *see also* U.S. CONST. art. I, § 8, cl. 2 (giving Congress the power to "borrow money on the credit of the United States").

law, subsequent cases would produce the same result regardless of whether they were filed in state or federal court. Since *Clearfield Trust*, the Court has decided a range of cases in which creation of common law would be a valid exercise of federal power.[73]

C. *Federal Common Law and Separation of Powers*

In addition to the federalism principles embodied by *Erie*, creation of common law by the federal courts raises separation of powers concerns. Some scholars have interpreted the *Erie* decision itself to exemplify these concerns. This interpretation is popularly referred to as the New *Erie* Doctrine:

> Some scholars have read Justice Brandeis' language in *Erie* as stressing separation of powers between branches of the federal government. In *Erie*, Justice Brandies rejected decades of federal common law in diversity cases in areas outside the scope of federal competence. New *Erie* scholars believe it is inappropriate for federal courts to create common law even within the scope of federal competence.[74]

While the New *Erie* Doctrine is beyond the scope of this article, the separation of powers concerns it raises are not. Such concerns are prevalent throughout the Supreme Court's federal common law jurisprudence. This article focuses on what Judge Friendly termed spontaneous generation[75]—or creating a federal rule as the rule of decision.[76] There are two other areas in which federal courts create common law that causes significant separation of powers problems: when the federal judiciary either (1) interprets a jurisdictional grant as a command to make common law or (2) creates a private right of action in furtherance of Congressional intent.

Creation of common law upon a jurisdictional grant is best exemplified by the Court's 1957 decision in *Textile Workers*

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73. In furtherance of areas of federal competence, Judge Friendly described federal common law as a valuable tool: "It has employed a variety of techniques—spontaneous generation . . . implication of a private federal cause of action . . . construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of statutory interstices." Friendly, *supra* note 61, at 421.

74. DOERNBERG & WINGATE, *supra* note 41, at 334 n.3.

75. Friendly, *supra* note 61.

76. *See infra* notes 95–147 and accompanying text.

Union of America v. Lincoln Mills of Alabama.[77] In that case, the Court construed a jurisdictional grant of power from Congress to hear collective bargaining disputes as a direction to create federal common law. Although section 301 of the Labor Management Relations Act provided no substantive rules for decision in such labor disputes, the Court coupled the jurisdictional grant with federal competence in the area of labor relations and created federal common law:

> It is not uncommon for federal courts to fashion federal law where federal rights are concerned. . . . Congress has indicated by § 301 (a) the purpose to follow that course here. There is no constitutional difficulty. Article III, § 2, extends the judicial power to cases "arising under . . . the Laws of the United States . . . ." The power of Congress to regulate these labor-management controversies under the Commerce Clause is plain . . . . A case or controversy arising under § 301(a) is, therefore, one within the purview of judicial power as defined in Article III.[78]

Justice Frankfurter dissented in *Lincoln Mills*. He likened the case to *Marbury v. Madison*,[79] a case in which the Supreme Court refused a grant of authority from Congress because of the non-judicial nature of the task.[80] Justice Frankfurter concluded by stating the majority's holding violated the doctrine of separation of powers because creating common law here would be extra-judicial in nature:

> Solicitude and respect for the confines of "judicial power," and the difficult problem of marking those confines, apply equally in construing precisely what duties Congress has cast upon the federal courts, especially when, as in this case, the most that can be said in support of finding a congressional desire to impose these "legislative" duties on the federal courts is that Congress did not mention the problem in the statute and that, insofar as purpose may be gathered from congressional reports and debates, they leave us in the dark.[81]

Lincoln Mills represents perhaps the most liberal approach the Court has taken to creating common law.

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77. 353 U.S. 448 (1957).

78. *Id.* at 457 (citing Clearfield Trust v. United States, 318 U.S. 363, 366-67 (1943)).

79. 5 U.S. (1 Cranch) 137 (1803).

80. *Lincoln Mills*, 353 U.S. at 484 (Frankfurter, J., dissenting).

81. *Id.* at 465 (Frankfurter, J., dissenting).

Separation of powers concerns are also raised when the federal judiciary implies a federal private right of action when Congress or the Constitution has not created one. The most notable case in which the Court has done so is *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[82] in 1971. In *Bivens*, the Court held that the Fourth Amendment contained an implied private right of action allowing the victim of an illegal search to sue the United States.[83] Justice Brennan, writing for the majority, noted that state law protections against trespass or illegal search may not fully compensate or protect Fourth Amendment interests.[84] Justice Brennan concluded that, because Congress neither provided an adequate remedy nor indicated that the Court should not do so, implying a private right of action was an appropriate step.[85]

A similar case was *Cannon v. University of Chicago*.[86] In *Cannon*, the petitioner brought suit against the University of Chicago claiming its admission policy was discriminatory against women, thereby violating the anti-discrimination provisions of Title IX of the Education Amendments of 1972.[87] Title IX proscribed discrimination in admissions decisions based on sex for institutions receiving federal funding.[88] Although Title IX contained an administrative remedy,[89] it contained no provision allowing a private right of action.[90] Nonetheless, the Court

82. 403 U.S. 388 (1971).

83. *See id.* at 397.

84. *Id.* at 395 (Brennan, J.) ("For just as state law may not authorize federal agents to violate the Fourth Amendment, neither may state law undertake to limit the extent to which federal authority can be exercised. The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action.") (citations omitted).

85. *Id.* at 395-96.

86. 441 U.S. 677 (1979).

87. 20 U.S.C. §§ 1681-1688 (2001).

88. *See* 20 U.S.C. § 1681 (2001) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .").

89. *See* 20 U.S.C. § 1682 (2001) (allowing withdrawal of federal funds from any institution not complying with the federal non-discrimination provisions).

90. *Cannon*, 441 U.S. at 717.

relied on precedent interpreting analogous statutes to create a cause of action.[91]

Justice Powell dissented in *Cannon*, arguing that the doctrine of separation of powers should prevent the Court from creating such remedies in most circumstances. According to Justice Powell, creation of implied rights of action would enable Congress to let the courts determine if a private right of action should exist. "Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide."[92] Also, Justice Powell disapproved of this technique because when federal courts, as counter-majoritarian institutions, create legislative remedies "the public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process."[93] Ultimately, Justice Powell's views would be adopted by the court in a series of decisions refusing to create a private right of action.[94] Justice Powell's reluctance to act in the face of Congressional silence would become deeply entrenched in the Court's federal common law jurisprudence over the next two decades. Since the Court decided *Cannon* in 1979, the doctrines of judicial restraint embodied in Justice Powell's concurrence have also influenced decisions like *Semtek* dealing with spontaneous generation of federal common law.

III. EVOLUTION OF TESTS USED BY THE SUPREME COURT IN CREATING FEDERAL COMMON LAW

Spontaneous generation of federal common law has undergone several changes in the sixty years since the Court decided

91. *Id.*

92. *Id.* at 743 (Powell, J., dissenting).

93. *Id.*

94. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that Title VI contained no implied private right of action to enjoin state discrimination where Title VI did not expressly address disparate-impact discrimination and an alternate remedial scheme existed); Schweiker v. Chilicky, 487 U.S. 412 (1988) (holding that improper discontinuance of federal disability benefits did not give rise to an implied private right of action where Congress had enacted an alternate remedial scheme); California v. Sierra Club, 451 U.S. 287 (1981) (holding the Rivers and Harbors Act of 1899 did not benefit any one class of people and therefore should not be construed as containing an implied private right of action).

Erie. In addition to the heightened emphasis on federalism principles, separation of powers concerns permeate modern federal common law jurisprudence. A relaxed view toward the creation of federal common law minimizes the law-making powers of both Congress and the States. Therefore, federal courts must tread carefully between the jurisprudential Scylla and Charybdis when contemplating creating common law.[95]

As a result of *Erie*, a federal court sitting in diversity must use state law to decide the substantive issues in a case. Thus, adoption of federal common law necessitates the displacement of state law.[96] A court must utilize a two part-test in determining whether it is appropriate to create federal common law.[97] First, the subject matter of the proposed common law must be within the scope of federal competence; common law outside the scope of federal competence is not a valid exercise of federal power.[98]

The second step deals with the content of the federal common law. Once a court finds federal competence and decides that federal law will control the case, it must decide between two available options. First, a court may decide to adopt existing state law as the federal rule of decision.[99] When a court decides to adopt state law as the federal rule of decision, the outcome of the case is still controlled by federal law; a court can depart from prior cases adopting state law as the federal rule of decision when state law becomes inconsistent with federal policy interests.

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95. *See* HOMER, THE ODYSSEY 189-201 (E.V. Rieu, trans., Penguin Books 1946) (describing the narrow safe path between Scylla, a dangerous monster, and Charybdis, a perilous whirlpool). Much like the creation of federal common law, Scylla and Charybdis allowed only a narrow path on which one could maneuver.

96. For purposes of clarity, this article refers to the creation or use of federal common law as the displacement of state law. This distinction will help distinguish cases when the court creates federal common law and adopts state law as the federal rule of decision from cases that refuse to adopt federal common law and simply use state law to decide the case.

97. *See generally* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 885-87 (1986).

98. *See supra* notes 54-55 and accompanying text.

99. *See, e.g.*, United States v. Kimbell Foods, 440 U.S. 715 (1979). This is the approach adopted by the Court in *Semtek*. *See infra* notes 112-25 and accompanying text.

For example, in *Semtek*, the unanimous Court adopted California claim-preclusion law as the effect of a dismissal on statute of limitations grounds of a federal court sitting in diversity.[100] State law did not conflict with any federal policy interests.[101] The Court recognized that federal common law with content referencing state law could only persevere as long as it did not compromise federal interests.[102] To demonstrate such a conflict, the Court stated that, if state law was inconsistent with the penalties assessed for willful violations of discovery orders outlined in the Federal Rules of Civil Procedure, "federal courts' interest in the integrity of their own processes might justify a contrary federal rule."[103]

Second, a federal court may decide to fashion a new federal rule rather than adopt state law as the content of federal common law. There are a number of reasons why a federal court might choose to fashion a new federal rule. First, adoption of state law may be inappropriate because of the many variations between the substantive law of the several states. Second, the adoption of state law might be inconsistent with federal policy interests.[104]

The tension between the two choices before a federal court faced with a choice-of-law decision goes to the essence of federalism. Adopting state law as the federal rule of decision rather than creating new rules of federal common law clearly values the substantive state law as conclusive when Congress is silent. Aside from the federalism conflict, federal courts are faced with separation of powers concerns. The extent to which a federal court should create federal common law when Congress has not

100. Semtek Int'l. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001).

101. *Semtek*, 531 U.S. at 509 ("No such conflict with potential federal interests exists in the present case. Dismissal of this state cause of action was decreed by the California federal court only because the California statute of limitations so required; and there is no conceivable federal interest in giving that time bar more effect in other courts than the California courts themselves would impose."). This concept is more fully explored in the text accompanying notes 134-41, *infra*.

102. *Id.* ("This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests.").

103. *Id.*

104. *See, e.g.*, Boyle v. United Techs., Corp., 487 U.S. 500 (1988) (refusing to use substantive Virginia tort law in a cause of action against a military contractor to protect the integrity of commercial relations between the United States and its contractors).

addressed the subject matter of the underlying dispute is questionable.[105] Federal courts are faced with the proverbial double-edged sword when deciding whether or not to fashion a new rule of federal common law.[106]

To facilitate a choice-of-law decision amidst these conflicting tensions, the Supreme Court has laid out two different standards for the displacement of state law and the creation of federal common law. Unfortunately, these tests seem to contain inherently contradictory principles, yielding cases with a wide variety of results. The three-factor test, exemplified by cases such as *United States v. Kimbell Foods*,[107] focuses on whether state law is compatible with federal interests as a precursor for the displacement of state law.[108] The significant conflict test, exemplified by cases such as *Boyle v. United Technologies*[109] and *Atherton v. FDIC*,[110] places much more emphasis on state law, holding that state law should only be displaced when there is a significant conflict between federal policy interests and the operation of state law.[111]

A. *The Three-Factor Test in* Kimbell Foods

The three-factor test stresses the importance of federal law governing federal areas of competence. Although this means that state law may be more easily displaced and federal common law will govern the outcome of the case, courts applying this test are more likely to adopt state law as the federal rule of decision. The three-factor test recognizes that, while federal common law should govern in areas involving important federal interests, state law is not always incompatible with furthering the federal interests in question. The case that best exemplifies application of the three-factor test is *Kimbell Foods*.

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105. *See supra* notes 92-94 and accompanying text.

106. For an extended discussion of the tension between federalism and separation of powers and its effect on the operation of federal courts, *see generally* DONALD L. DOERNBERG, IDENTITY CRISIS: FEDERAL COURTS IN A PSYCHOLOGICAL WILDERNESS (2001).

107. 440 U.S. 715 (1979).

108. *See infra* notes 112-25 and accompanying text.

109. 487 U.S. 500 (1988).

110. 519 U.S. 213 (1997).

111. *See infra* notes 126-33 and accompanying text.

In *Kimbell Foods*, the Court examined the priority of federal liens held by bankrupt debtors. The debtors in question had both federal government loans (Small Business Administration and Farmer's Home Administration loans) and loans from private creditors. The United States sought a ruling granting priority on liens assessed through the federal programs. The law of the creditors' states (here, Texas and Georgia) granted priority to the first-perfected lien. The United States argued that the collection of federal liens, much like the collection of federal taxes, must be administered by a set of uniform rules rather than being subjected to the varying commercial statutes of the several states. Further, the public fisc would be placed in jeopardy because it would be significantly less likely that the United States would collect repayment on many of the outstanding loans.[112]

The Court found federal common law applied, but adopted state law as the federal rule of decision.[113] The Court rejected the United States' contention that the federal loan programs needed a uniform rule, noting: "[as] a quasi-commercial lender, [the Government] does not require . . . the special priority which it compels as sovereign in its tax-collecting capacity."[114] Further, Texas and Georgia were among the forty-nine states that had adopted Article 9 of the Uniform Commercial Code, so an almost-uniform rule existed among the several states. Moreover, the agencies in question devoted substantial individual attention to each debtor. When coupled with the detrimental effect a mandatory prioritized federal lien would have on private creditors, the need for a uniform federal rule proved slight.[115] The Court used federal common law to decide the case by adopting state law as the federal rule of decision rather than fashioning a new rule to decide the case.

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112. *Kimbell Foods*, 440 U.S. at 735-37.

113. *Id.* at 740 ("[A]bsent a congressional directive, the relative priority of private liens and consensual liens arising from these Government lending programs is to be determined under nondiscriminatory state laws.").

114. *Id.* at 737-38.

115. *Id.* at 737 ("Both agencies have promulgated exhaustive instructions to ensure that loan recipients are financially reliable and to prevent improvident loans. The Government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc.") (footnote omitted).

The *Kimbell Foods* Court used the three-factor test to weigh the interests involved in choosing the content of the federal rule of decision.[116] First, a court must examine whether the operation of the federal program necessitates uniform federal rules. Second, a court must determine if application of state law would frustrate the specific objectives of the federal program. Finally, a court must consider the extent to which application of a uniform federal rule would undermine transactions made upon state law.

The first and second factors recognize the existence of some federal interests (including the various federal programs) that require a uniform federal rule for their success. For example, the Court held in *Banco Nacional de Cuba v. Sabbatino*[117] that foreign relations issues must be decided under a uniform body of federal law. In *Sabbatino*, sugar purchased in Cuba was seized by the Cuban government before it could be delivered to the American buyer. The Court rejected the claim that *Erie* mandated New York law be used to decide this diversity case, holding that the federal foreign relations policy at issue must be applied to ensure a uniform national approach in areas of foreign policy.[118]

However, it does not follow that all federal programs require the application of a uniform federal law to operate. Aside from *Kimbell Foods*, the Court has refused to create a uniform federal law to further federal programs on numerous other occasions. For example, *Bank of America National Trust & Savings Ass'n v. Parnell*[119] involved an action between private parties concerning, among other things, whether or not stolen United States bonds were overdue. While *Clearfield Trust* held that the rights and duties of the United States on its commercial paper were governed by federal law, the Court held the federal issue in this case was insignificant and would be properly han-

116. *Id.* at 728-29.

117. 376 U.S. 398 (1964).

118. *Id.* at 425 ("However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community *must be treated exclusively as an aspect of federal law*. It seems fair to assume that the Court did not have [this] in mind when it decided Erie R. Co. v. Tompkins.") (emphasis added) (footnote omitted).

119. 352 U.S. 29 (1956).

dled under state law.[120] Similarly, in *Miree v. DeKalb County*,[121] the Court held that the federal interest in controlling the use of national airspace did not necessitate a uniform federal rule where the underlying dispute was between private parties, and the rights of the United States would be only marginally affected, if at all.[122]

The third factor weighs the extent to which application of a uniform federal rule would undermine transactions made upon state law. This factor is best exemplified by cases like *Kimbell Foods*, where the Court held that application of a uniform federal rule would contravene the reasonable expectations of the bankrupt debtors' other creditors.[123] An analogous example is *United States v. Yazell*,[124] where recovery of a Small Business Administration loan was before the Court. While Texas law prevented a married woman's separate assets from being seized to satisfy an outstanding debt, there was no federal statute preventing such a seizure. Although the loan was made pursuant to a federal program, the Court used Texas law to decide the case. The Court found no pressing need for a uniform federal rule because, as in *Kimbell Foods*, the Small Business Administration spent a good deal of time working out the loan details with each individual debtor and could allow for the operation of the law of the debtor's state.[125]

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120. *Id.* at 33-34 ("The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.").

121. 433 U.S. 25 (1977).

122. *Id.* at 30. *But cf.* Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974) (refusing to use state law of negligence because regulation of national airspace was an important federal interest).

123. *See supra* notes 112-15 and accompanying text.

124. 382 U.S. 341 (1966).

125. *Id.* at 353 ("Clearly, in the case of these SBA loans there is no 'federal interest' which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes.").

B. *The Significant Conflict Test*

Unlike the three-factor test used in *Kimbell Foods*, the significant conflict test requires federal courts to further scrutinize the disparities between federal and state law before displacing the latter in favor of the former. Application of this test results in state law being displaced in notably fewer cases: "[In] a *few areas involving 'uniquely federal interests*,'. . . state law is preempted and replaced, where necessary, by federal law of a content prescribed . . . by the courts."[126] Aside from requiring the case to fall within the narrow scope of "uniquely federal interests," the significant conflict test requires that state law in question be substantially incompatible with those federal interests. Specifically, "[d]isplacement will occur only where . . . *a significant conflict exists* between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation."[127] Such an approach severely limits the number of cases in which federal courts can displace state law in favor of federal common law, even if they would ultimately adopt state law as the content of the federal common law. Courts applying this test must first find either (1) a conflict between an identifiable policy interest and operation of state law or (2) that application of state law would frustrate specific objectives of federal legislation.

An example of a case satisfying the significant conflict test is *Boyle v. United Technologies Corp. Boyle* was a federal diversity action involving the wrongful death of a Marine helicopter pilot killed when his aircraft crashed during a training exercise. The action alleged negligent design of the aircraft by United Technologies, the military contractor who sold the helicopter to the armed forces. Writing for the majority, Justice Scalia noted that adopting state law as the federal rule of decision significantly conflicted with federal policy considerations because subjecting military contractors to tort liability would have a direct, undesirable financial effect on the United States.[128] Since the

126. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1987) (emphasis added) (citation omitted).

127. *Id.* at 507 (citations omitted) (emphasis added).

128. *Id.* at 507 ("The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline

significant conflict prerequisite had been met, the Court affirmed the federal common law rule of immunity for military contractors created by the Fourth Circuit.[129]

In contrast, a case where the Court was unable to find a significant conflict between application of state law and a federal policy interest is *Atherton v. FDIC*.[130] *Atherton* dealt with the standard of care with which a federally-insured bank's board of directors must execute transactions and loans. State law provided for actions in simple negligence, gross negligence, and breach of fiduciary duty. Federal statutes allowed for gross negligence but did not preempt state claims. FDIC sought creation of a uniform common law rule mandating a minimum standard of care for officers of federally-chartered banks. The Court rejected FDIC's argument, finding it unnecessary that federally-chartered bank officers be subject to the same set of duties nationwide.[131] Federally-chartered banks have always been subject to the laws of the states in which they do business.[132] Therefore, a significant conflict between the application of state law and a federal policy interest did not exist. In the end, the Court held that state law should not be displaced unless it was less inclusive in defining gross negligence.[133]

IV. DID THE COURT ABANDON THE SIGNIFICANT CONFLICT TEST IN DECIDING *SEMTEK*?

In finding that the integrity of federal diversity judgments depended upon a uniform national rule for their enforcement,[134]

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to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected."); *see also id.* at 512 ("In sum, we are of the view that state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced.").

129. *Id.* at 514.

130. 519 U.S. 213 (1997).

131. *Id.* at 221.

132. *Id.* at 223 (noting that the days when federally-chartered banks would have to defend themselves from state tax collectors are long past). *Compare* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

133. *Id.* at 227.

134. Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 507 (2001) ("[W]e have long held that States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes.").

Semtek held that federal common law governed the claim-preclusive effect of federal judgments.[135] Further, the Court found that national uniformity would be best served by allowing state law to determine the claim-preclusive effect of a federal diversity dismissal.[136] By adopting state law as the federal rule of decision, the claim-preclusive effect of a statute of limitations dismissal would be the same in a federal court sitting in diversity as in a court of the state in which that federal court sits.[137] Such a decision was desirable because it so perfectly reflected the principles of the *Erie* doctrine.[138]

However, the *Semtek* Court's reasoning represents a clear departure from the significant conflict test exemplified by cases like *Boyle* and *Atherton*. *Semtek* presented a situation where there was no significant conflict between the application of state law and a significant federal policy interest. Because *Semtek* involved a federal court sitting in diversity, *Erie* mandated that the court use California substantive law. The Court has held that statute of limitations periods are within the realm of substantive law for *Erie* choice-of-law decisions.[139] Also, while the Court recognized that a uniform rule regarding the claim-preclusive effect of federal diversity dismissals was an important federal policy interest, it found that the federal interest was actually augmented by adopting state law as the federal rule of decision: "nationwide uniformity in the substance of the matter *is better served* by having the same claim-preclusive rule (the state rule) apply whether dismissal has been ordered by a state or federal court."[140] While the Court cautioned that this

135. *Id.* at 508 ("In [a previous case] the State was allowed (indeed, required) to give a federal diversity judgment no more effect than it would accord one of its own judgments only because reference to state law was *the federal rule that this Court deemed appropriate*. In short, federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.").

136. *Id.* ("Since state, rather than federal, substantive law is at issue there is no need for a uniform federal rule. And indeed, nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether dismissal has been ordered by a state or federal court.").

137. *Id.* ("This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by State courts in which the federal diversity court sits.").

138. *See supra* notes 39-57 and accompanying text.

139. *See* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

140. *Semtek*, 531 U.S. at 508 (emphasis added). In this context, applying the same rule refers to always applying the substantive law of the state in which the

adoption of state law would change if state law became incompatible with the integrity of federal diversity dismissals,[141] such a situation did not exist when *Semtek* was decided. Thus, the case completely lacked any significant conflict between application of state law and an important federal policy interest.

Rather than applying the significant conflict test, the *Semtek* Court used considerations similar to the three-factor test used in *Kimbell Foods*.[142] Although *Semtek* did not cite *Kimbell Foods*, the three factors are easily recognizable in the Court's decision. First, the Court evaluated whether or not the federal program necessitated uniform federal rules, concluding that the integrity of federal judgments required a uniform rule created by the Supreme Court.[143] Second, the Court found that application of state law would not frustrate the integrity of federal courts sitting in diversity: "any other rule [than the state rule] would produce the sort of 'forum-shopping . . . and . . . inequitable administration of the laws' that *Erie* sought to avoid, since filing in, or removing to, federal court could be encouraged by the divergent effects that the litigants would anticipate from likely grounds of dismissal."[144] Finally, the Court considered the third *Kimbell Foods* factor, dealing with the disruption of transactions predicated on state law that would occur if a new rule of federal common law were to be fashioned. Although *Semtek* did not involve the type of commercial transactions in question in *Kimbell Foods*, the Court examined the reasonable procedural assumptions parties entering litigation would have about the claim-preclusive effect of a federal court diversity dismissal. After *Erie* and its progeny, litigants should expect a federal court sitting in diversity to apply the substantive law of the state in which it sits.[145] Adoption of a new fed-

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federal court is sitting. In this sense, the application of state law is the same, although the content of the substantive law will vary among the several states.

141. *Id.* at 509. *See also supra* notes 100-09 and accompanying text.

142. *See supra* text accompanying note 116.

143. *Semtek*, 531 U.S. at 507 ("[E]ven when States are allowed to give federal judgments (notably, judgments in diversity cases) no more than the effect accorded to state judgments, that disposition is by direction of this Court, which has the last word on the claim-preclusive effect of all federal judgments.").

144. *Id.* at 508-09 (quoting Hanna v. Plumer, 380 U.S. 460 (1965)).

145. *See id.*

eral rule would disrupt the decades of jurisprudence since the Court decided *Erie*.

It is odd that a unanimous Court created federal common law in *Semtek;* considering that the Court required a significant conflict between state law and a federal policy interest as late as 1997 with *Atherton*.[146] As discussed above, *Semtek* presented a situation completely lacking such a conflict. Perhaps it is even more striking that Justice Scalia wrote the *Semtek* opinion; only fourteen years earlier, he wrote the majority opinion in *Boyle* calling for a significant conflict before a court created common law.[147] The approach used by the *Semtek* Court more closely resembles the approach used in *Kimbell Foods*, where the Court found that federal common law governed the case because federal loan programs were a significant national interest but adopted state law as the federal rule of decision.

V. CONCLUSION

After *Semtek*, the precise future of the Supreme Court's common law jurisprudence is uncertain. While *Semtek* represents a departure from the stricter standards of the significant conflict test exemplified by cases like *Boyle* and *Atherton*, it is unclear whether the decision represents a complete return to the three-factor test of *Kimbell Foods*. Perhaps *Semtek* presented a situation proponents of the significant conflict test never anticipated; its facts squarely pitted *Erie* and its progeny against the significant conflict test. However, it is clear that the Court needed to decide *Semtek* as it did to clarify the meaning of "on the merits" in Rule 41(b).[148] Regardless of whether the reasoning in *Semtek* is transient or permanent, two things are certain. First, it is clear that the Court will continue to decide federal common law cases with a watchful eye to both the principles of federalism and separation of powers and years of mismatched precedent. Second, it does not appear that the jurisprudence surrounding this body of law will become any clearer, even to scholars. As one author described the study of federal common law: "It is clear that where the Constitution, or

146. *See supra* notes 130-33 and accompanying text.
147. *See supra* notes 126-27 and accompanying text.
148. *See supra* note 5 and accompanying text.

a valid Act of Congress, provides a rule of decision, it must be applied by a federal court – and by a state court – in cases where there is concurrent jurisdiction. Beyond that very little is clear."[149]

149. WRIGHT, *supra* note 53, at 412.