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The Judicial Prerogative

Thomas W. Merrill*

In John Locke's account of separation of powers, the executive is not limited to enforcing the rules laid down by the legislature. The chief magistrate also exercises the prerogative, a power "to act according to discretion for the public good, without the prescription of the law and sometimes even against it."¹ Locke explained that such a discretionary power is required because "it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm, if they are executed with an inflexible rigor on all occasions and upon all persons that may come in their way."²

Given their experience with George III, it is not surprising that the Framers of the United States Constitution failed to embrace Locke's executive prerogative. The Supreme Court, for its part, has also rejected it. "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good times and bad," Justice Black wrote in his opinion for the Court in the *Steel Seizure Case*.³ Justice Black concluded that the President enjoys no inherent power to act in default of Congress; his authority must in every case "stem either from an act of Congress or from the Constitution itself."⁴

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1. JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 199 (Everyman ed. 1970).

2. *Id.* at 200.

3. See *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579 (1952).

4. *Id.* at 585. Whether Justice Black's reasoning was in fact endorsed by a majority of the Court is debatable. Although four other Justices joined in his opinion, they each wrote separate concurring opinions. Of these separate concurring opinions, only those of Justice Jackson and Justice Douglas clearly rejected the idea that the President's "executive power" entails certain inherent powers to act in default of Congress. See *id.* at 641 (Jackson, J. concurring); *id.* at 632-33 (Douglas, J. concurring). The concurring opinions of Justice Frankfurter and Justice Burton reserved judgment on whether the President might have inherent powers outside of the context of the issue presented in the case, *id.* at 597 (Frankfurter, J. concurring); *id.* at 659 (Burton, J., concurring). The four other

The question I address in this paper is whether the conclusion reached by Justice Black in the *Steel Seizure Case* applies with equal force to the judicial branch of the federal government. That is to say, do principles of separation of powers embodied in the Constitution permit federal courts to exercise a "judicial prerogative" — a power to promulgate federal rules of decision "according to discretion for the public good, without the prescription of the law and sometimes even against it" — or are federal courts, like the President, constrained to act only pursuant to authority found in enacted law?

I.

I will begin my inquiry, as often seems to be required in this area, with some clarification of terms. What do I mean by "judicial prerogative" and "enacted law," and why do I use these terms instead of "federal common law"? By "judicial prerogative," I refer to a power of courts to create rules of decision based solely on a claim of inherent authority.⁵ By enacted law, I refer to authoritative sources of law other than the court's own rules of decision, the paradigmatic example being a statute. For purposes of the present discussion, which focuses on the powers

Justices who did not join the Black opinion indicated that they were prepared to recognize some kind of inherent executive power in at least some circumstances. *See id.* at 661-62 (Clark, J. concurring in the judgment); *id.* at 682-83; 7-8-710 (Vinson, C.J. joined by Reed & Minton, J.J. dissenting). Thus, the actual lineup on whether the President has a prerogative may have been: no — three votes; not here, elsewhere maybe — two votes; yes — four votes. Notwithstanding the ambiguities over whether the reasoning of Justice Black's opinion in fact commanded a full majority, it has become conventional to view the *Steel Seizure Case* as having rejected the idea of an executive prerogative. *See* David Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 25-26; *cf.* Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VIR. L. REV. 1253, 1264 & nn. 58-59 (1988) (stating that most commentators believe "some realm of inherent authority in domestic matters exists" although Krent himself disclaims the idea).

5. One can further distinguish between a "strong prerogative," which would permit courts to formulate rules of decision on their own authority "against" the prescription of enacted law, and a "weak prerogative," which would permit courts to adopt decisional rules on their own authority only if not inconsistent with enacted law. The most prominent argument in support of the former is found in GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). I will generally confine my observations to the weak version, however, since this is the only version that has any prospect of being recognized by the Supreme Court. Moreover, if the weak version violates separation of powers, then *a fortiori* the strong version would be impermissible.

of federal courts, I regard the U.S. Constitution, federal and state statutes, and state common law rules as being enacted law. In each case, the source of the rule of decision lies outside the control of the federal court itself.⁶

Previous writing on federal common law — including both my own and Professor Martha Field's — has defined "federal common law" broadly to include both prerogative law and judicial lawmaking under the authority of enacted law.⁷ There are, however, several reasons why it is important to distinguish between these two phenomena, and to focus initially on the judicial prerogative rather than other arguable forms of federal common law.

First, whether there is a judicial prerogative has significant implications for the scope of authority of federal courts. With the prerogative, federal courts can make law whenever they believe "federal interests" justify their doing so,⁸ or whenever they believe it is necessary to decide a case properly within their jurisdiction.⁹ Without the prerogative, federal courts will have to trace their authority to make law to some source in enacted law. Notwithstanding the explosion in federal legislation that has taken place in this century, there are still pockets of law untouched by enacted federal law (e.g., the standards for granting a divorce). Thus, restricting federal courts to lawmaking under the authority of enacted law would directly constrain their powers.

Second, whether there is a judicial prerogative has an important bearing on how courts decide cases. There are a number of Supreme Court decisions that adopt federal rules of decision

6. The distinction between judicial prerogative and enacted law is thus similar to that between "natural law" and "positivism," at least insofar as positivism refers to rules defined by "their pedigree or the manner in which they were adopted or developed," RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 17 (1977), and therefore is understood to be broad enough to include things like common law rules developed by some other judicial system. See generally Fred Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Steven Smith, *Why Should Courts Obey the Law?*, 77 GEO. L. J. 113 (1988).

7. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890-899 (1986); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 3-7 (1985); see also Peter Westen and Jeffrey Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

8. See Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 813 (1989).

9. See Steven Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573.

in areas touched by enacted federal law, without making any attempt to derive the authority for the rule from the enacted law. Instead, they justify the creation of a federal common law rule based on its utility.¹⁰ The rationales of these decisions, to use Locke's words, are grounded in the Court's perception of the "public good," not the "prescription of law." If there is no judicial prerogative they would have to be regarded as illegitimate.¹¹

Third, if we conclude that there is no prerogative, then the debate over federal common law is radically simplified: it is a debate over what is legitimate in the name of interpretation of enacted law. To be sure, this still includes a wide range of possibilities. At one extreme, you would have the position that federal courts must limit themselves to enforcing the specific intentions of the drafters of enacted law.¹² At the other extreme, you would have the position of Professor Field — joined now by Professor Larry Kramer — that once Congress has legislated in an area, federal courts are free to make law in that area so long as it is not inconsistent with the statute.¹³ My own position, which I have spelled out more fully elsewhere,¹⁴ is intermediate between these two positions: I would permit federal courts to go beyond conventional interpretation and make law in the common law mode provided they can show either that Congress has

10. I would include here cases like *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *Milwaukee v. Illinois*, 406 U.S. 91 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Barr v. Mateo*, 360 U.S. 564 (1959).

11. Professor Field suggests that most of the opinions in these cases could be rewritten so as to trace the authority to create a federal rule of decision from enacted law. See Field, *supra* note 7, at 906, 946. Since I do not share her extremely casual attitude toward what constitutes legitimate interpretation, I do not fully agree with this. But even if the only consequence of rejecting the prerogative were to require that judicial opinions be written differently, that would be a not inconsequential conclusion.

12. This, for example, is the implicit view of the judicial role that underlies *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 845 (1984). See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1000-1001 (1992).

13. Field, *supra* note 7, at 893 (stating that in formulating rules of federal common law, "the judiciary chooses the 'best rule' based on its own notions of policy and upon whatever policies it finds implicit in the constitutional and statutory provisions it does have an obligation to follow"); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 289 (1992) ("federal courts can make common law . . . so long as whatever rules the courts fashion are consistent with and further an underlying federal enactment").

14. Merrill, *supra* note 7.

enacted law delegating lawmaking powers to courts, or that it is necessary to replace state with federal law in order to preserve a provision of enacted law. However, notwithstanding the wide range of options available in the name of "interpretation," at least the issue would be joined on common ground, and it would be incumbent on the partisans of an expansive view of judicial lawmaking power to explain how their position can be squared with ordinary understandings of what constitutes interpretation of legal texts.

In my previous article, I identified four "norms of legitimacy" that constrain federal courts in creating new federal rules of decision: federalism, separation of powers, electoral accountability, and the Rules of Decision Act.¹⁵ I portrayed these four norms as mutually reinforcing, and as combining to form a larger understanding that federal courts may not adopt rules of decision that have not been at least implicitly authorized by enacted law. I continue to believe that each of these norms is relevant to any inquiry into the legitimacy of judicial prerogative, and that the case against an inherent power of judicial lawmaking is stronger when all four constraints are considered in conjunction than when any one is examined in isolation.

I will use this occasion, however, to focus more specifically on the separation-of-powers norm. One reason for concentrating on separation of powers is that today's Supreme Court takes separation of powers more seriously than any of the other structural principles.¹⁶ The Court would at least give respectful attention to a separation of powers argument about the judicial prerogative; whether it would even listen to a plea based on the other constraints, such as the Rules of Decision Act, is more doubtful.¹⁷ The other reason for focussing on separation of pow-

15. Merrill, *supra* note 7, at 12-32.

16. See, e.g., *Washington Metropolitan Airports Auth v. Citizens to Prevent Abatement*, 111 S. Ct. 2298 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986); *INS v. Chadha*, 462 U.S. 919 (1983). Even when the Court rejects arguments grounded in separation of powers theory, it strongly reaffirms the idea of separation of powers as a limiting principle. See, e.g., *Freitag v. CIR*, 111 S. Ct. 2631, 2634 (1991); *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

17. I say this notwithstanding my colleague Marty Redish's recent effort to rehabilitate the Rules of Decision Act. See Martin Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 Nw. U. L. Rev. 761 (1989). The Court's principal response to the Rule of Decision Act in recent

ers is that there is clearly more to say — on both sides of the question — than I suggested in my previous article.

II.

The Constitution contains a number of provisions that call into question what I have called the judicial prerogative. None of these provisions establishes an ironclad argument against the prerogative. If there were such an argument, the matter would not be the subject of continuing debate. Still, I think the cumulative effect of these provisions is sufficient at least to tilt the balance strongly toward the anti-prerogative viewpoint.

Perhaps the first and most plausible place to look for guidance about the lawmaking powers of federal courts is the division of powers between the three constitutional branches of government. The Vesting Clause of Article I of the Constitution provides that “All legislative Powers herein granted shall be vested in a Congress of the United States.”¹⁸ When this language is contrasted with the parallel Clause of Article III, stating that “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,”¹⁹ it would seem that whatever else may be included in the “judicial power,” it cannot include the power “to legislate,” because “all” legislative power has been given to Congress. Thus, if the judicial prerogative — a discretionary power to make rules of decision based on the court’s assessment of the public good — is plausibly regarded as a species of the “legislative power,” it would be seem to be prohibited by the language of Article I § 1. A very similar argument was endorsed by Justice Black’s opinion in the *Steel Seizure Case* in support of the conclusion that the President has no power to “make law” under the Constitution.²⁰

years has been to ignore it. See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

18. U.S. CONST. art. I, § 1 (emphasis added).

19. U.S. CONST. art. III, § 1.

20. 343 U.S. at 587-88. Justice Black’s rejection of the executive prerogative in the *Steel Seizure Case* presupposes that the Vesting Clause of Article I confers an *exclusive* power to make law (not just statutes) on the Congress. This construction logically should mean that the judiciary is also barred from performing such a function. On the other hand, there is a textual basis for distinguishing the executive from the judicial preroga-

The division-of-powers argument is not necessarily dispositive, however. The problem is that the term "legislative power" is ambiguous. It could mean, as Justice Black assumed, the power to "make law." But it could also mean the power to "make statutes" (or their functional equivalent).²¹ On the latter reading, the Vesting Clause of Article I would establish an exclusive grant of the power to Congress to act as the federal statute-maker, but would not have anything to say about the power of either the President or the federal judiciary to engage in other forms of discretionary lawmaking (such as elaboration of common law norms). Years ago, Professor Corwin recognized this possibility with respect to the powers of Congress and the President.²² He urged that the President be deemed to have discretionary authority to act for the nation in default of legislation by Congress, *i.e.*, an executive prerogative. Congress could then respond to the President's discretionary action with legislation, which the President would be obliged to follow under the Supremacy Clause.²³ But unless or until Congress responded by statute, the President could continue to define public policy for the Nation.

The same interpretative options are presented by the respective powers of the Congress and the federal judiciary. If the "legislative power" refers only to the power to make statutes, then the "judicial power" might include the discretionary power to adopt rules of decision in default of Congress, subject to override by congressional legislation. But if the "legislative power" means the power to "make law" more broadly, then courts would have no purely discretionary power to act in default of

tive. Article II specifically provides that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art II § 3. Justice Black also relied on this provision, noting that "the President's power to see that the law are faithfully executed refutes the idea that he is to be a lawmaker." 343 U.S. at 587. Significantly, no analogous duty is expressly imposed on federal courts in Article III. Thus, the absence of any Take Care Clause for the judiciary might provide a basis for recognizing the judicial prerogative, even if the Supreme Court has rejected any such power for the executive.

21. That is to say, "[e]very Order, Resolution, or Vote to Which the Concurrence of the Senate and the House of Representatives" are necessary. See U.S. CONST. art I, § 7, cl. 3.

22. Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953).

23. See *infra* note 31 [quoting the Clause].

enacted law. On this view, courts could engage in "lawmaking" only if the power given to Congress is delegable (which it is),²⁴ and only if it has in fact been delegated to the federal courts pursuant to enacted law. Decisions of the Supreme Court such as the *Steel Seizure Case* suggest that the broad, "law-making" reading of the legislative power is the correct one,²⁵ but as an original matter neither the text nor the history of the Constitution supply a definitive answer.²⁶

Another basis for questioning the prerogative is that the

24. See *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (Congress has broad power to delegate discretionary authority to entity located in the judicial branch); *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394, 409 (1928) (Congress may confer broad discretion on executive or judicial branches as long as it lays down an "intelligible principle" to follow).

25. The nondelegation cases, *see supra* note 24, also support this conclusion. In holding that executive agencies and courts can exercise discretionary authority only if Congress has laid down an "intelligible principle" to follow, the doctrine presupposes that it is a constitutional requirement, derived from Art. I § 1, that governmental actors other than Congress can make law only if authorized to do so by Congress. There are numerous statements from the Supreme Court in a variety of contexts that equate the "legislative power" with the power to "make law." *See, e.g., Massachusetts v. Mellon*, 262 U.S. 447, 488 (1929) ("[t]o the legislative department has been committed the duty of making laws"); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

26. The critical word "all" was added to the Vesting Clause of Article I late in the Convention, by the Committee on Style. The previous draft submitted by the Committee on Detail spoke only of "the legislative power." D. FARBER & S. SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 423, 428 (1990). There is no record indicating that this change generated any discussion, or that the Convention attributed any significance to the new wording. Similarly, the potential significance of the word "all" goes largely unremarked in the ratifying conventions and early commentaries on the Constitution.

There are two other arguments for not taking the use of the word "all" in the Vesting Clause very seriously. First, it is arguably inconsistent with other provisions in the Constitution. The Constitution quite explicitly gives the President an institutional role in the process of producing statutes. Any bill, to become law, must be presented to the President for signature or veto, and if vetoed must be enacted by a two-thirds majority in each House. U.S. CONST. art. I, § 7. Moreover, the President is given the power to "make Treaties, provided two thirds of the Senators present concur," U.S. CONST. art. II, § 2, cl. 2, and treaties are regarded a part of the "Supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Thus, "all legislative Powers" granted by the Constitution (in either the law-making or the statute-making sense) are *not* vested in the Congress.

Second, when read in conjunction with the Vesting Clauses of Articles II and III, it may be that the "all" in Article I was intended only to underscore the words "herein granted," as if to say: "only those powers herein granted" shall be vested in the Congress. *See Calabresi & Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992). On this reading, Articles II and III would vest general executive and judicial powers in the President and the courts respectively, but Article I would vest only a list of enumerated legislative powers in Congress.

Framers very likely did not understand the "judicial power" referred to in the Vesting Clause of Article III to include a power to "make law" in a discretionary fashion. As Justice Scalia has recently argued:

'The judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish must be deemed to be the judicial power as understood by our common-law tradition. That is the power 'to say what the law is,' not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it — discerning what the law is, rather than decreeing what it is today *changed to*, or what it will *tomorrow be*.²⁷

In other words, the original understanding was that courts would be law-finders not law-makers. This understanding, the argument goes, is inconsistent with the judicial prerogative.

Justice Scalia is surely correct that the "judicial power" was thought by the Framers to include the authority to ascertain and enforce the common law.²⁸ And he is also correct that the received understanding of the common law method in the late eighteenth century was one of "discovery" rather than "creation."²⁹ But it does not inevitably follow (as Justice Scalia ap-

27. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2450-51 (1991) (concurring opinion) (citations omitted).

28. See George D. Brown, *Of Activism and Erie — the Implication Doctrine's Implications for the Nature and Role of Federal Courts*, 69 *IOWA L. REV.* 617, 623 (1984); Note, *The Federal Common Law*, 82 *HARV. L. REV.* 1512, 1515-16 (1969).

29. According to Professor Morton Horwitz:

In eighteenth century America, common law rules were not regarded as instruments of social change; whatever legal change took place generally was brought about through legislation. During this period, the common law was conceived of as a body of essentially fixed doctrine to be applied in order to achieve a fair result between private litigants in individual cases.

M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 1 (1977). Even sophisticated commentators of the day who acknowledged that the common law did change nevertheless viewed such changes as reflecting evolving social custom, not as resting on altered perceptions by judges of correct social policy. This understanding is reflected, for example, in James Wilson's *Lectures on Law*, delivered in 1791:

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

pears to believe) that it is unconstitutional for modern federal courts to engage in free-wheeling creation of new common-law norms. It all depends on the level of generality at which the Framers understood the meaning of "the judicial power." They may have understood that phrase at a very high level of generality — as simply the power to decide cases. Or they may have understood it at a more detailed level, as including the power to decide cases under common law, but without having any specified understanding of common law method. Or they may have understood it at an even more detailed level as encompassing the power to decide cases under common law in the law-finding manner of 18th century common law courts. In principle originalist sources might tell us what level of generality was intended,³⁰ but as is often the case the historical record is too thin to provide a definitive answer. Statements at the time of the founding that presuppose a law-finding judiciary do not necessarily mean the Framers understood that no other judicial role would be permissible.

A further phrase in the Constitution that bears on the subject is the description of federal law that appears in the jurisdictional grant of Article III and in similar form in the Supremacy Clause. In both places, the Constitution describes federal law as that which arises under "this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."³¹ It can be argued that each of the referenced sources — the Constitution, federal statutes, and treaties — is a form of enacted law. If this is the proper reading, then the inference can be drawn that the Constitution equates federal law with enacted law. The Constitution on this reading

the accommodated system. But though the system suffer these partial and successive alterations, yet it continues materially and substantially the same. The ship of the Argonauts became not another vessel, though almost every part of her materials had been altered during the course of her voyage.

1 THE WORKS OF JAMES WILSON 353 (McCloskey, ed. 1967).

30. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 148-150 (1990); Michael Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 *VIR. L. REV.* 669, 678-79 (1991).

31. U.S. CONST. art. II, § 2. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Art. VI, cl. 2.

would make no provision for federal court jurisdiction over cases arising under prerogative law, and more importantly, would provide no basis for finding that such law is the "supreme Law of the Land." Although these defects would not necessarily rule out all federal common law — one could still have federal common law of the *Swift v. Tyson*³² variety — they would weigh heavily against construing the Constitution to permit the judicial prerogative.

Although I find the suggestion that the Constitution equates federal law with enacted law highly plausible,³³ it has been rejected by the Supreme Court. In particular, the Court has held that the "laws" referred to include federal common law rules of decision, both for jurisdictional and Supremacy Clause purposes.³⁴ The word is probably sufficiently ambiguous to admit of such a construction, and thus again it cannot be said that the language of the jurisdictional grant and the Supremacy Clause necessarily must be read as precluding the judicial prerogative.

Finally, there is the Due Process Clause of the Fifth Amendment. The exact meaning of the Clause has long been debated, but at the minimum it can be read as adopting the principle that no one may be deprived of life, liberty or property by a federal officer except in accordance with the law of the land.³⁵ In

32. 41 U.S. (16 Pet.) 1 (1842), *overruled*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

33. The key question is whether "laws" means "statutes." An earlier draft of Article III was unambiguous, providing that the judicial power would extend to "cases arising under laws passed by the legislature of the United States." See CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 538-39 (1928). Whether the Framers changed the language to broaden the grant of jurisdiction, or simply as a matter of style, is unknown.

34. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850 (1985); *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-100 (1972). Cf. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1939) (construing "laws" of the states in the Rules of Decision Act to include common law decisions).

35. Sir Edward Coke, a commentator familiar to the Framers, equated "due process of law" with the "per legem terre" language of Chapter 29 of the Magna Carta. EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 50 (1797 ed.). Although recent scholarship has called this interpretation into question, see Keith Jurov, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM L. LEGAL HIST. 265 (1975), there is no reason to think that the Framers did not accept Coke's equation of the two ideas. See, e.g., Joseph Story, *Commentaries on the Constitution of the United States* 663 (1833) (Due Process Clause "is but an enlargement of the language of magna carta"). See generally *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1049 (1991) (Scalia, J., concurring in the judgment).

other words, at the very least the Clause guarantees the rule of law: the federal government may impinge on private rights only in accordance with fixed general principles knowable in advance. The judicial prerogative is arguably inconsistent with such a guarantee, for it contemplates that one class of federal officers — federal judges — has a discretionary power to take life, liberty and property in accordance with new rules of decision announced and applied for the first time to the case at hand.³⁶

Although I find the proposed construction of due process appealing, I must admit that it has not been squarely endorsed by the Supreme Court. There are some tantalizing suggestions: for example, the Court's recent punitive damages decision — which says that due process prohibits courts from setting damage awards without "a sufficiently definite and meaningful constraint" on their discretion,³⁷ and the strong trend toward rejecting prospective overrulings of prior judicial decisions because of the "legislative" overtones of such a practice.³⁸ But, again, I cannot maintain that the Due Process Clause necessarily must be read as precluding the kind of discretionary judicial lawmaking contemplated by the judicial prerogative.

The clause-by-clause quest for an answer to the legitimacy of the judicial prerogative is therefore inconclusive. But proceeding in this fashion risks obscuring the big picture. For one thing, there is the cumulative effect of the clause-specific arguments. Standing alone, none is dispositive. Taken together, they constitute a far more compelling case that there is something anomalous about the prerogative.

In addition, the clause-by-clause approach overlooks what may be one the most salient aspects of our Constitution — its aspiration to subordinate all of government to written law. The

36. Similarly, Justice Jackson argued in his concurring opinion in the *Steel Seizure Case* that the proper reading of the Take Care Clause, when read in conjunction with the Due Process Clause, is that "ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." 343 U.S. at 646.

37. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991).

38. See *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) (holding that civil rule applied to one party should be applied to all others pending on direct review); *Griffin v. Kentucky*, 479 U.S. 314 (1987) (adopting rule of retroactive application in all criminal cases pending on direct review); cf. *Teague v. Lane*, 489 U.S. 288 (1989) (new rules do not relate back to convictions challenged on habeas corpus).

idea plays a powerful role in our tradition. It is the cornerstone of *Marbury v. Madison*³⁹ and the institution of judicial review. It shows up in the modern era in the strong presumption in favor of judicial review of the constitutionality of executive action.⁴⁰ Indeed, we have come to associate the judiciary very closely with the idea that ours is a government subject to the constraints of written law. Given this understanding, it would be ironic, to put it mildly, to discover that the judiciary itself enjoys an inherent power to make rules of law not traceable to any provision of written law. It is true that the Framers failed to anticipate this precise point. But then, they failed to spell out the power of judicial review and the presumption of reviewability too. In each case, the most basic implications of the document have revealed themselves only with time. That does not mean, however, that the understanding is any less fundamental to American constitutionalism, or less fatal to the idea of the judicial prerogative.

III.

When we turn from the Constitution itself to the Supreme Court's decisions construing it, I think the same general lesson can be drawn. There are opinions that appear to reject the prerogative,⁴¹ and opinions that cannot be explained on any basis other than the existence of the prerogative.⁴² But the better judgment — the judgment reached at critical junctures in our history when the full implications of the question were most clearly revealed — has been to reject the idea of the judicial prerogative as being inconsistent with the precepts of constitutional government.

A.

Professor Bruce Ackerman has popularized the idea of "constitutional moments," *i.e.*, important turning points in our history when the received understanding of the Constitution has

39. 5 U.S. (1 Cranch) 137 (1803).

40. *E.g.*, *Webster v. Doe*, 108 S. Ct. 2047, 2053 (1988).

41. *See, e.g.*, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981).

42. *See, e.g.*, *Boyle v. United Technologies Corp.*, 488 U.S. 500 (1988).

undergone a significant transformation or clarification.⁴³ By analogy, there are two such “moments” that bear directly on the issue of the judicial prerogative.

The first occurred as part of a great national debate over the Sedition Act of 1798.⁴⁴ The federal Constitution, as universally understood in the 1790's, did not contain an enumerated power that authorized Congress to enact the Sedition Act. The Federalists' argument in support of its constitutionality was as follows: seditious libel was a crime at common law; the federal courts have an inherent power to try common law crimes;⁴⁵ therefore Congress, under the Necessary and Proper Clause, has the power to revise (and in fact “liberalize”) the common law crime of seditious libel. The Federalist case for the Sedition Act, in other words, depended on recognizing something very much like what I have called the judicial prerogative. Public outcry against this theory was an important element in the elections of 1800 and 1804, and contributed to the sweeping victories of the Jeffersonian Party over the Federalists in those years.

The outcome at the ballot box dictated the outcome when the issue of an inherent judicial power to try common law crimes finally came before the Supreme Court in *United States v. Hudson & Goodwin*.⁴⁶ Justice Johnson (a Jefferson appointee) announced that “[a]lthough this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion.”⁴⁷ Reasoning from both federalism and separation of powers premises, Johnson announced that before the coercive power of the federal government may be brought to bear on an individual, “[t]he legislative

43. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 17, 22 (1991); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1055-56 (1984).

44. For general background, see 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 766-784 (1953); Stewart Jay, *The Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985).

45. There were in fact numerous Federalist-inspired common law criminal prosecutions in the federal courts in the first two decades after the adoption of the Constitution. See STEPHEN PRESSER, *THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE* ch. 6 (1991).

46. 11 U.S. (7 Cranch) 32 (1812). See generally Note, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 925-30 (1992).

47. *Hudson*, 11 U.S. at 32.

authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."⁴⁸ When *Hudson* was reaffirmed four years later in *United States v. Coolidge*,⁴⁹ this time outside the context of seditious libel, the idea of an inherent federal judicial power to try common law crimes passed into history, never to be seriously asserted again.⁵⁰

If *Hudson* and *Coolidge* mark a constitutional moment, just how momentous was it? There is language in the *Hudson* opinion that could easily be taken as rejecting any federal judicial prerogative.⁵¹ And indeed there are indications that this was the general understanding throughout the nineteenth century.⁵² *Hudson* itself, however, has come to be treated as precluding the use of judicial prerogative only in the context of common law

48. *Id.* at 34.

49. 14 U.S. (1 Wheat.) 415 (1816).

50. *Coolidge* revealed that there were in fact continuing divisions in the Court over the issue, but also that the faction favoring federal common law crimes was unable to muster the support to obtain a decision validating the idea. After failing to secure legislation conferring a common law criminal jurisdiction on the Circuit Courts, Justice Story, as Circuit Justice in Massachusetts, held that, notwithstanding *Hudson*, federal courts sitting in admiralty had inherent authority to punish common law offenses against the authority of the United States. *United States v. Coolidge*, 25 F.Cas. 619 (C.C.D. Mass. (1813)). On appeal, Justice Johnson indicated that the members of the Supreme Court were divided on the question. But because the Attorney General declined to argue the cause (he deemed *Hudson* controlling), and because no counsel appeared for the defendant, Johnson indicated that the Court "would not chose to review their former decision in the case of *United States v. Hudson and Goodwin*, or draw it into doubt." 14 U.S. (1 Wheat.) at 416. After that, the Court never revisited the issue.

51. *See, e.g.*, 11 U.S. (7 Cranch) at 33: "It is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those Courts as a consequence of their creation."

52. *See, e.g.*, *Wheaton v. Peters*, 33 U.S. (8 Wheat.) 591, 658 (1834) ("It is clear, there can be no common law of the United States There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union."); *Smith v. Alabama*, 124 U.S. 465, 478 (1888) ("There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alternation as may be provided by its own statutes."); *Western Union Tel. Co. v. Call Pub. Co.*, 181 U.S. 92, 101 (1901) ("There is no body of Federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of state law enacted by the several States.").

crimes. One reason why the decision can be read this narrowly is that it cast the prerogative issue largely in terms of jurisdiction.⁵³ The opinion can thus be read as establishing that federal courts must trace their *jurisdiction* over the subject matter of the case from enacted law, but as not foreclosing the exercise of prerogative to formulate *rules of decision* in cases where jurisdiction has otherwise been established. This means, for example, that it was possible to read *Hudson* as not foreclosing the exercise of the prerogative where federal courts have an independent basis for jurisdiction, as in admiralty or diversity cases.

The second "constitutional moment" occurred over one hundred years later, when the Court laid to rest any exercise of judicial prerogative to formulate rules of decision in diversity cases. There can be little doubt that *Erie R. Co. v. Tompkins*⁵⁴ was a transformative event.⁵⁵ It rendered irrelevant thousands of decisions in the federal reports, reoriented our understanding of the relationship between federal courts and state courts, permanently transformed the nature of legal practice in what was then the largest area of federal court jurisdiction, and established a scholarly agenda for an entire generation of legal academics.⁵⁶

Like *Hudson*, *Erie* contains some very broad language that could be taken as disposing of the prerogative issue once and for all:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. 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. There is no federal general common law.⁵⁷

Again, however, the language has not been read for all it is worth. Just as *Hudson* has been implicitly limited to the common law of crimes, *Erie* has essentially been limited to diversity

53. 11 U.S. (7 Cranch) at 33-34.

54. 304 U.S. 64 (1938).

55. Ackerman himself has described the decision as "a star of the first magnitude in the legal universe." BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 272 n. 4 (1977).

56. *Id.* at 169.

57. 304 U.S. at 78.

cases. Indeed, *Erie* is now widely regarded by both the Court and commentators as a decision about the evils of "forum shopping" in diversity cases, rather than a decision about the limits of federal judicial power.⁵⁸

The failure to read *Erie* broadly can also be explained in part by its rationale. *Erie* articulated the constitutional case against the prerogative exclusively in terms of federalism. The Court stressed that "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."⁵⁹ Thus, the previous doctrine of *Swift v. Tyson* "invaded rights which in our opinion are reserved by the Constitution to the several States."⁶⁰

Erie's focus on federalism may in turn explain the rise of the so-called "new federal common law."⁶¹ In some post-*Erie* cases like *Clearfield Trust Co. v. United States*,⁶² the Court seemed to be operating on the assumption that federal courts can exercise common law powers in any area that has been visited by congressional legislation. If *Erie* is just a case about federalism, this would make sense: the fact that Congress has constitutionally legislated in an area establishes that there is no federalism problem, and there being no federalism problem, there is no *Erie* problem.

As it turned out, therefore, both constitutional moments were read more narrowly than they had to be. Still, there can be no denying the significance of these decisions. At the very least, after *Hudson* and *Erie* — and the settled understanding they

58. The process of recasting *Erie* as a decision about the need for parity between federal and state courts began in *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941) and was solidified by *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Modern scholarship has tended to dwell on the same concerns. See John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977).

59. 304 U.S. 78.

60. *Id.* at 80.

61. Henry J. Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

62. 318 U.S. 363 (1943).

reflect — the dispute over the judicial prerogative has been roped off in an area that excludes (1) criminal cases, (2) diversity cases, and (3) cases dealing with questions outside the enumerated powers of Congress. More broadly, given the watershed nature of these decisions, and the unqualified terms in which they condemn the judicial prerogative, there can be little doubt that they have placed the pro-prerogative forces on the defensive.

Not surprisingly, therefore, although the record of the post-*Erie* years is mixed, there is overall a distinctly apologetic tone to the scattered decisions that recognize some form of the prerogative. The Court has cautioned that federal courts “are not general common-law courts and do not possess a general power to develop and apply their own rules of decision,”⁶³ that federal common law applies only in “some limited areas,”⁶⁴ and that those areas are “few and restricted.”⁶⁵ The words “federal common law” are often placed in quotation marks, or prefixed with the modifier “so called.”⁶⁶ When the Court does have recourse to federal common law, it often “adopts” state law as the rule of decision (thereby minimizing the impact of federal common law).⁶⁷ And the Court has announced that the standard for determining whether congressional legislation displaces federal common law is much more lenient than the standard for determining federal preemption of state law.⁶⁸ All-in-all, there is a sense of unease about the decisions adopting federal common law, verging on guilt. The tone of these decisions, if not always the outcome, suggests that there is something anomalous about federal common law, and that it fits uncomfortably within the general jurisprudential assumptions about the role of federal courts under the Constitution.

Finally, as a kind of counterpoise to the persistence of the “new federal common law,” the Court has begun to question the legitimacy of federal judicial lawmaking in certain areas not tra-

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

64. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

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

66. *See Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2514 (1988); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 64 (1966).

67. *E.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979).

68. *See Milwaukee v. Illinois*, 451 U.S. 304, 314-17 (1981).

ditionally regarded as presenting a federal common law question. Most prominent here are decisions adopting a more restrictive attitude toward judicial implication of private rights of action, with some Justices suggesting that the practice of adopting private rights of action without a clear congressional directive violates separation of powers.⁶⁹ Commentators have dubbed this development the "New *Erie*" doctrine.⁷⁰

B.

Against the evidence drawn from *Hudson* and *Erie*, the continuing grudging attitude toward federal common law, and the rise of the "New *Erie*" separation of powers thesis, there stand three contrary elements in our institutional practice: the use of federal common law to resolve interstate disputes, the use of federal common law in suits in admiralty, and the exercise of common law powers by the state courts, which like their federal cousins operate within a system of government organized on principles of separation of powers. In each of the three named areas courts formulate decisional rules in the common law mode; in each they exercise considerable discretion in the formulation of policy, subject only to the limits imposed by *stare decisis*. Can the use of common law decisionmaking in these areas be reconciled with a more general understanding that separation of powers restricts courts to acting under the authority of enacted law?

Perhaps. The first thing I would note is that what we witness in each of these areas today — the exercise of prerogative-like judicial powers — was not perceived that way when the judicial role was first inaugurated. In the world of the late eighteenth century and early nineteenth century, interstate disputes were resolved according to established principles of international law;⁷¹ admiralty disputes were resolved under the general mari-

69. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J. concurring); *Cannon v. University of Chicago*, 441 U.S. 677, 730-49 (1979) (Powell, J. dissenting).

70. See Donald Doernberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759; Brown, *supra* note 28.

71. See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838) (interstate boundary dispute).

time law;⁷² and state common law disputes were adjudicated under the common law of England and such English statutes as had been adopted by the state legislatures. In each case, the courts saw their task as "discovering" the law reflected in settled custom or precedent. Over time, with the triumph of Legal Realism and the *Erie* decision, courts came to see their function in these areas as one of contributing to an evolving judge-made jurisprudence, that is, as more prerogative-like. But by then, the primacy of common-law making was so well established in each area that its legitimacy was beyond challenge. To a considerable extent then, the use of prerogative-like powers in these areas does not call into question a more general understanding that federal courts are limited to authority given by enacted law.

Moreover, the apparent paradox that "state common law has a legitimacy in cases like *MacPherson v. Buick Motor Co.* that federal common law lacks in cases like *Illinois v. Milwaukee*"⁷³ has a direct positivist explanation: state courts exercise a general common law jurisdiction because *state statutes authorize them to do so*. When the colonies broke away from England, there was considerable uncertainty about what impact this had on the laws theretofore enforced by the colonial courts. The solution was to enact state statutes "receiving" the common law of England (and often certain general statutes of England modifying the common law) as the rule of decision for the State.⁷⁴ Similar statutes were then adopted for the territories and the newer States as they were admitted to the Union. A typical example, still in force today, is the following statute of Illinois:

The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and the ninth chapter of 27th Henry

72. See *The Lottawanna*, 88 U.S. (21 Wall.) 558, 571-78 (1874).

73. Weinberg, *supra* note 8, at 806.

74. See E. BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836* 25-26 (1964) (table summarizing initial receiving laws); Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791 (1951). Apparently only Connecticut of the original colonies left it to the courts themselves to declare the continuing force of the common law. *Id.* at 800.

Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.⁷⁵

These receiving statutes thus represent an example of what I have called "delegated lawmaking":⁷⁶ the state legislature has transferred discretionary authority to the state courts to exercise a defined common law jurisdiction, specifically, a general jurisdiction building on the common law of England. Given this statutory authority, the exercise of a general common law jurisdiction by state courts does not call into question the thesis that separation of powers prohibits the exercise of judicial prerogative by federal courts.

The use of federal common law in admiralty cases and interstate disputes is harder to reconcile with an anti-prerogative framework. The problem in each case was that, with some exceptions, federal courts had been given exclusive jurisdiction to resolve these disputes,⁷⁷ but neither the Constitution nor Congress had the foresight to give them a corresponding grant of authority to adopt preemptive decisional rules. In the case of interstate disputes, the power to issue judgments preemptive of state law was clearly required in order to keep the grant of jurisdiction from becoming a dead letter. The Supreme Court could not effectively resolve a boundary dispute between two States if the States were free to turn around and adopt legislation mandating a contrary disposition.⁷⁸ In the case of admiralty jurisdiction, the federal courts could continue to function if the States had a revisionary power, but the whole point of granting exclusive jurisdiction to the federal courts was to insure a single uniform jurisprudence in an area central to foreign and interstate commerce, and this purpose would be frustrated by divergent

75. Ill Ann. Stat. ch. 1 § 801.

76. Merrill, *supra* note 7, at 40-46.

77. Section 9 of the Judiciary Act of 1789 gave the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." 1 Stat. 77 (1789). This exclusive jurisdiction continues to this day. See 28 U.S.C. § 1333. Section 13 of the Act, following Art. III, § 2, cl. 2, gave the Supreme Court exclusive jurisdiction "of all controversies of a civil nature, where a state is a party, except between a state and its citizens." 1 Stat. 80 (1789). The current version is at 28 U.S.C. § 1251(a).

78. See Field, *supra* note 7, at 916.

state law.⁷⁹

Although it took many decades for the Court to perceive the full implications of the situation, in both areas it eventually construed the grant of exclusive jurisdiction to contain within it an implicit grant of power to formulate decisional rules in the common law manner, which rules could not be altered by the states.⁸⁰ Implicit delegation of lawmaking authority is obviously less satisfactory under an anti-prerogative framework than is explicit delegation. Nevertheless, as long as it is confined to the circumstances where (1) the Constitution or a federal statute confers exclusive jurisdiction on federal courts and (2) the exercise of revisionary powers by the States would either nullify the grant of jurisdiction or undermine its very reason for being, per-

79. See David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 158, 159-64.

80. On the admiralty side, the key steps were (1) the determination that congressional power to revise general maritime law is not limited by the Commerce Clause, but is coextensive with the grant of exclusive maritime jurisdiction to the federal courts, *Butler v. Boston and Savannah Steamship Co.*, 130 U.S. 527, 557 (1889); *In re Garrett*, 141 U.S. 1, 12-14 (1891); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924); (2) the holding that state statutes dealing with maritime matters are invalid if they "work[] material prejudice to the characteristic features of the general maritime law" as declared by the federal courts, *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917); and (3) the determination that the preemptive force of federally-declared maritime law was not affected by *Erie*, see *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, 411 (1953). After the fact, the Court was able to say "We consistently have interpreted the grant of admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95-96 (1981).

On the interstate dispute side, the law developed largely in suits between States over boundary and water apportionment issues, where the Court had original and exclusive jurisdiction. These disputes tended to be intensely factual and often involved the construction of interstate compacts. Not surprisingly, therefore, for the first century or so the Court gave little attention to the precise source of law. See *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931) ("For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require."). Well before *Erie* was decided, however, the Court recognized that the law it applied in these cases could not be subject to revision by the States that were parties before it. See, e.g., *Kansas v. Colorado*, 206 U.S. 46, 95-98 (1907). And in order to protect the law the Court applied in the original jurisdiction cases, it was necessary to apply the same law when interstate disputes arose in cases involving private parties. See, e.g., *Cissna v. Tennessee*, 246 U.S. 289, 295 (1918). Thus, in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), decided the same day as *Erie*, the Court could cite extensive authority for the proposition that questions involving the apportionment of an interstate stream were governed by "federal common law."

haps the practice in these areas can be accommodated to the overall presuppositions of a system based on separation of powers.

IV.

In addition to considerations based on text, precedent, and institutional practice, several "functional" considerations are relevant in trying to determine whether the judicial prerogative can coexist with separation of powers. I shall consider first two arguments that weigh against the prerogative, then an argument that supports it.

A.

Article I of the Constitution establishes some important procedural hurdles that must be surmounted before somebody's good idea can become the law of the land. A bill must be approved within the same legislative session by both the House and the Senate, and must then be presented to the President for his approval. If the President vetoes the measure, then it must be approved by two-thirds of the House and Senate, again within the same legislative session. As the Supreme Court has observed, "the prescription for legislative action in Art. I, §§ 1,7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."⁸¹ This "finely wrought" procedure serves a number of purposes, including slowing down the lawmaking process to insure adequate deliberation,⁸² raising the barriers to measures sponsored by factional interests,⁸³ protecting the constitutional functions of the President,⁸⁴ and insuring that the interests of the States are fully considered before state law is displaced by federal law.⁸⁵

If federal courts had a prerogative to make decisional rules without congressional authorization, then they would short cir-

81. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

82. *Id.* at 947-48, 949-50.

83. *Id.*

84. *Id.* at 947.

85. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 550-52, 556 (1985).

cuit the procedural hurdles to federal lawmaking erected by Article I. Federal law could be made without bicameral approval or presentation to the President. Accordingly, none of the purposes advanced by those procedures — promoting deliberation, frustrating factions, protecting the President, protecting the States — would be served as well (if at all) by prerogative law. Of course, the same criticism can be made of any lawmaking by the executive agencies or the courts pursuant to power delegated by Congress. But at least when agencies and courts make law pursuant to authority conferred by enacted law, Congress and the President have made the judgment — following the procedures of Article I — that it is permissible to dispense with the procedures of Article I. The judicial prerogative would allow the courts to decide for themselves when to do the dispensing.

Article I's procedural requirements also provide the answer to the oft-repeated notion that judicial prerogative presents no separation of powers problem because Congress can always override judge-made law.⁸⁶ The judicial prerogative would allow courts to evade the procedural barriers of Article I, lowering the costs of making federal law. However, in order to undo the judge-made law, Congress would still have to surmount those barriers. Thus, recognizing a judicial prerogative would radically alter what is in effect a bias against new federal law, and would replace it with a bias against *undoing* (judge-made) federal law.

A second functional objection to the prerogative is that it has no inherent limits. As Locke observed, "prerogative is nothing but the power of doing public good without a rule."⁸⁷ For the partisans of the federal judicial prerogative, the governing standard is equally breathtaking. For example, Professor Weinberg says that in every case, "what justifies an exercise of national lawmaking power is the existence of a legitimate national governmental interest . . . [N]o other 'authorization' is required."⁸⁸ But once it is asserted that a judicial finding of a legitimate "federal interest" is sufficient to support judicial lawmaking, what is to stop the federal courts from becoming the primary

86. See, e.g., CALABRESI, *supra* note 5, at 92-93; Monaghan, *The Supreme Court, 1974 Term — Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 34 (1975).

87. LOCKE, *supra* note 1, at 202.

88. Weinberg, *supra* note 8, at 813.

engine of policy formation? The partisans of the prerogative have no answer to this question — except to appeal to the self restraint of federal judges. Under a Constitution founded on the principle that all unchecked power is to be regarded with suspicion, this is not enough.

To be sure, even with the prerogative there would be constraints on the freedom of action of federal courts. Federal courts are empowered to declare law only as an incident of their power to decide “cases” and “controversies,” and this constitutional limitation works against judicial aggrandizement.⁸⁹ Moreover, even if federal courts have inherent power to make law, presumably they would not make law that contradicts existing enacted law.⁹⁰ But these constraints may be less meaningful than often supposed. Expanded rules of standing, class actions, and remedies give federal courts powers of institutional reform unimaginable in the past.⁹¹ And since Congress generally does not legislate against a background rule that assumes an inherent judicial power to make law, such enacted law as exists will generally take a form that can be construed as an alternative source of empowerment, rather than as a constraint on judicial prerogative.

In looking for a meaningful source of constraint on judicial power in the Constitution, the most plausible candidate is the “law constraint.” In other words, federal courts — like the executive branch — should be viewed as institutions that are completely dependent on enacted law for their authority. With this background understanding, enacted law becomes a source both of empowerment and constraint. Enacted law supplies the occasion for lawmaking, but also provides inherent limitations on the exercise of that power. When the terms of the enacted delegation run out, the power to make law runs out. The anti-prerogative view thus supplies a way of holding the judicial power, like the powers granted to the other branches of the na-

89. See generally Krent, *supra* note 4.

90. Unless, of course, one adopted the Calabresian “strong prerogative” position, see *supra* note 5, in which case even this limit would not apply.

91. See, e.g., *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990) (upholding district court decree which, as modified, required local school district to raise taxes to pay for construction of magnet schools of sufficient quality to stem “white flight”).

tional government, in check.⁹²

B.

Against the foregoing functional considerations stands Locke's justification for the prerogative — the argument from necessity. Legislators, Locke argued, cannot "foresee and provide by laws for all that may be useful to the community . . . nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands."⁹³ In the context of the judicial prerogative, as Professor Steven Smith has pointed out,⁹⁴ the argument from necessity takes two quite different forms. One, which he calls the policy perspective, stresses the need for the judicial prerogative in order to make sure that important "federal interests" do not go unprotected because of legislative inattention.⁹⁵ The other, which is based on the duty of courts to decide cases, posits that the prerogative is necessary in order to permit federal courts to reach a judgment in cases properly before them when Congress has failed to provide a rule of decision.⁹⁶

In its policy form, the argument from necessity presents a seeming paradox: it presupposes that it is meaningful to speak of "federal interests" that are so strong they must be protected by *someone*, and yet are so weak they have failed to secure the

92. The contributions of Professors Field and Kramer to this panel may be read either as denying that there is a judicial prerogative, and then endorsing a very broad conception of legal interpretation, or as endorsing the prerogative, subject to the limitation that federal courts can make law only in areas where Congress has legislated. In either event, the proposed limitation would provide virtually no constraint on federal judicial lawmaking. It is hard to think of any area of human activity — from land use planning to family life to funding for the arts — that has not been touched by federal regulation and/or federal grants-in-aid. Thus, the suggestion that it would be necessary to show that Congress has legislated in the area would amount to little more than a pleading barrier before federal courts could take off on an unguided exercise formulating new rules of decision based on perceptions of utility.

93. LOCKE, *supra* note 1, at 199; see also text at *supra* note 2.

94. See Smith, *supra* note 9.

95. *Id.* at 587-593. For a defense of what Smith would call the policy maker argument, see Weinberg, *supra* note 8. See also Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875 (1991).

96. Smith, *supra* note 9, at 581-82.

protection of enacted law. As such, the argument raises some rather large philosophical questions. To what extent do evaluative statements like "this is a federal interest" reflect a metaphysical reality that is "out there," independent of its embodiment in enacted law? And what are the best methods for ascertaining "federal interests" — moral argumentation (for which read litigation) or the ballot box? Exploring these issues would take me far beyond the confines of this paper. Suffice it to say that my own instincts incline toward metaphysical skepticism (at least about what constitutes a "federal interest") and deference toward democratic procedures. That is to say, I view "federal interests" as a social construct, the best measure of which is enacted law. This does not mean that "federal interests" always reveal themselves in enacted law in a self evident fashion; some strenuous interpretation may occasionally be required to tease them out. But to say this is different from buying into the proposition that federal courts have a direct pipeline into a reservoir of "federal interests" that have never captured the allegiance of the elected branches of government.

The other necessity argument — based on the duty to decide cases — raises more of an empirical question. Are the law-making tools available to federal courts under the authority of enacted law up to the task of deciding all cases properly within their jurisdiction, or are they not? One cannot evaluate this version of the necessity argument without exploring, at least in a very summary way, the second issue posed by the general definition of "federal common law": What is legitimate in the name of interpretation of enacted law? The wider the range of action available to courts in interpreting and otherwise giving effect to enacted law, the fewer will be the occasions when courts will find they are stumped about how to answer a particular question that must be resolved in order to decide a case properly before them. Let me briefly mention a number of ways in which federal courts can make law (and hence provide decisional rules for the resolution of cases) consistent with the view that they must always act under the authority of enacted law.

First, the understanding that there is no judicial prerogative applies only to the articulation of "rules of decision," that is, rules that govern the "rights, duties and relations of persons"

outside the judicial branch.⁹⁷ Separation of powers principles should not be regarded as precluding the exercise of prerogative with respect to internal operating rules of the courts. Thus, for example, federal courts should be regarded as having an inherent power, in the absence of congressional intervention, to formulate rules of procedure and evidence.⁹⁸ Similarly, they should be regarded as having inherent authority to decide how to decide, that is, to adopt rules of legal method for guiding the process of interpreting enacted law. I would include under this heading rules for the introduction and use of evidence of legislative intent (such as legislative history), canons of construction that serve as default rules in the absence of adequate evidence of legislative intent, and rules governing the treatment of precedent, including not just judicial precedent but also the precedent of relevant executive branch interpreters.⁹⁹ The inherent authority of courts to decide how to decide obviously introduces a significant element of judicial discretion, and justifies the conclusion that courts inevitably and rightly "make law" when they seek to further legislative intent through interpretation of enacted law.

Second, consistent with the limitations of the nondelegation doctrine, Congress may delegate discretionary authority to federal courts to formulate rules of decision. The delegation may be either explicit or implicit. As discussed above, one form of implicit delegation occurs when Congress confers exclusive jurisdiction on federal courts in a context where allowing the states to exercise a revisionary power would frustrate the purpose of the jurisdictional grant. A more common form of implicit delegation is when Congress enacts a statute containing broad language that must be filled in by the courts through the process of case-by-case adjudication, the federal antitrust laws being a prime example.¹⁰⁰ I would also include here cases where Congress leaves an internal gap in a statute creating a federal cause of

97. *Cf. INS v. Chadha*, 463 U.S. 919, 952 (1983) (Presentment and Bicameralism Clauses apply only to rules affecting the rights, duties and relations of persons outside the legislative branch).

98. *See Merrill, supra* note 7, at 46-47 & n. 200.

99. *See Merrill, supra* note 12, at 1003-1012.

100. *Merrill, supra* note 7, at 43-46 (discussing federal antitrust laws as a paradigmatic form of delegated lawmaking).

action, *i.e.*, a gap that must be resolved in order to decide a case which Congress has directed the courts to hear. In such cases, the court should be regarded as having been delegated implicit authority by the enacting statute to try to fill the gap in accordance with congressional intent.

Third, courts have available two powerful tools that result in the creation of new federal decisional rules by negating existing state rules. One is the Supremacy Clause of the Constitution, which allows federal courts to find that state law has been preempted by federal law, again either explicitly or implicitly, and must be replaced by a federal rule of decision.¹⁰¹ The other is the Commerce Clause, which has been interpreted as conferring exclusive power on Congress to enact rules that discriminate against or impose an undue burden on interstate commerce. Thus, state laws that discriminate or create undue burdens are invalid unless expressly authorized by Congress.¹⁰²

Cumulatively, the foregoing powers — each of which I believe can be reconciled with the anti-prerogative position — should be sufficient to resolve most of the cases that today fall under the rubric of “federal common law.” In particular, these doctrines legitimize a great deal of judicial “lawmaking,” and yet they do so without losing sight of the touchstone of enacted law.

Furthermore, at least in the federal system, courts that cannot resolve issues in terms of enacted federal law can always fall back on state law. Indeed, the Rules of Decision Act — itself of course enacted law — directs that state laws shall provide the rule of decision in cases where they apply “except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide.”¹⁰³ Thus, because the federal

101. See, *e.g.*, *Hillsborough County Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13 (1985) (summarizing categories of implied preemption).

102. The idea that the Commerce Clause, U.S. Const. Art. I 8, confers an exclusive power on Congress over some, but not all, interstate commerce, was first clearly articulated in *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851). Although it is possible to question this interpretation as an original matter, see *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J. dissenting) (noting that the Constitution treats commerce “as a unitary subject”), it is based on an interpretation of enacted law (the Constitution) that is too well entrenched today to call into question.

103. 28 U.S.C. § 1652.

courts operate against a backdrop of a separate system of law, there is further reason to doubt that they need the prerogative in order to fulfill their duty to decide cases.¹⁰⁴

V.

The debate over what I have called the judicial prerogative has long been, and shows every sign of continuing to be, discontinuous. The opponents of the prerogative talk the language of legitimacy, demanding to know where the authority to make federal common law comes from, and what the limits of such a power might be. The proponents of the prerogative talk the language of utility, asking whether the world would be a better place if federal courts could never make federal common law. Obviously, it would be nice to find a solution that gave us both legitimacy and utility, but I doubt that such a happy solution exists.

My approach has been to start with the legitimacy perspective, and try to build some flexibility into it. This strategy, if it remains true to the norms of legitimacy, must inevitably sacrifice utility in some cases. But at least it promises to rescue a fair amount of what has been called federal common law, without giving up on the idea that there are inherent constraints on judicial power. The other approach, which would start with the utility of giving federal judges a broad power to make law in default of Congress, offers no inherent stopping place at all. Ultimately, the only constraint on judicial lawmaking would be the public perception of how good a job the judges are doing in governing the nation.

Locke was aware of this. He pointed out that the “prerogative was always largest in the hands of our wisest and best princes” because the people observed “the whole tendency of

104. My colleague Gary Lawson has developed what is in effect another reason why the duty to decide cases does not justify the prerogative: if the moving party cannot demonstrate to the satisfaction of the court that enacted law supports his position, the court can simply say “not proven” and dismiss the case. *See* Lawson, *Proving the Law* (unpublished ms.). If we think of propositions of law as requiring a minimum degree of proof, then the dismissal of party A’s case for failure to prove the law would not “make law” one way or the other for other cases, anymore than would dismissal of A’s the case for failing to prove the facts establish a precedent binding on future cases.

their actions to be the public good.”¹⁰⁵ Those who today cry out for the judicial prerogative seem to share a similar faith that federal judges are “our wisest and best princes.” Perhaps they are correct in this assessment. But as Locke went on to observe, it was this very tendency to cede great discretion to wise rulers that gave rise to the saying, “That the reigns of good princes have been always most dangerous to the liberties of their people.”¹⁰⁶ For alas, good princes tend to be followed by those who “manag[e] the government with different thoughts.” When this has happened, Locke acknowledged with characteristic understatement, it “often occasioned contest, and sometimes public disorders, before the people could recover their original right and get that to be declared not to be prerogative which truly never was so.”¹⁰⁷ Justice Frankfurter expressed the same thought in his concurring opinion in the *Steel Seizure Case*: “The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”¹⁰⁸

The generation that gave us our Constitution was skeptical of Locke’s executive prerogative, because they saw in it a threat to their liberties. The judicial prerogative deserves no better.

105. LOCKE, *supra* note 1, at 202.

106. *Id.*

107. *Id.*

108. 343 U.S. at 594 (Frankfurter, J. concurring).