ARTICLES

THE PERSISTENCE OF GENERAL LAW

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Commentators often assume that with the demise of Swift v. Tyson, the American legal system has abandoned the very concept of "general" law. But while that concept no longer informs the relationship between state and federal courts, reports of its death are otherwise exaggerated. Indeed, the structure of our federal system effectively compels courts to continue drawing certain rules of decision from general American jurisprudence rather than from the local law of any individual state.

This Article has three basic aims. First, it demonstrates the continuing relevance of rules of general law—rules whose content is not dictated entirely by any single decisionmaker (state or federal), but instead emerges from patterns followed in many different jurisdictions. Second, it uses a variety of seemingly unrelated circuit splits to show that courts lack a solid framework for analyzing the relationship between written federal law and background rules of general law. Third, it begins to develop such a framework. In the course of doing so, the Article sheds new light on a recurring problem in statutory interpretation: How can courts best identify what Frank Easterbrook calls the "domain" of a federal statute? The Article also establishes that when courts articulate rules of "federal common law" to fill vacuums created by written federal law, they assert less creative power than modern commentators typically suggest.

INTRODUCTION

Studies of American federalism have elegantly catalogued the ways in which federal law can interact with the local law of individual states.¹ Many federal rules of decision address only a few discrete questions, leaving each state free to regulate related matters as it sees fit. Other federal rules themselves incorporate local law in certain respects, so that their substance differs in different states.²

Modern scholars, however, have been slower to acknowledge a different way in which federal law can piggyback on state law. Within the interstices of written federal law, courts often articulate federal rules of decision that again draw their substance from state law. Rather than tracking

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the local law of any single state, though, these federal rules reflect state law *in general*; what matters is how *most* states do things, not whatever the policymakers in one particular state have said.

To take just one example, consider the legal rules that determine the federal government's rights and obligations under contracts to which it is a party. Under current doctrine, no individual state is in charge of those rules; in the absence of relevant federal legislation, the governing rules are instead a matter of "federal common law." But the substance of those rules nonetheless reflects a multijurisdictional form of general American jurisprudence. As Judge Posner puts it, courts derive the legal rules applicable to government contracts from "the core principles of the common law of contract that are in force in most states" (tweaked where necessary to reflect "special characteristics of the federal government as a contracting partner")).  

The Supreme Court has taken much the same approach to a variety of federal statutes that implicate background concepts of agency law, tort law, contract law, or the like. When the Bankruptcy Code refers to "fraud," for instance, the Court has understood it to be incorporating "the general common law of torts, the dominant consensus of common-law jurisdictions."  

Likewise, the Court has assumed that various modern federal statutes implicitly draw their rules of vicarious liability from "the general common law of agency, rather than . . . the law of any particular State."  

For scholars who assume that the Court's landmark decision in *Erie Railroad Co. v. Tompkins* marked the end of the very concept of "general" law, this theme in modern jurisprudence is hard to fathom—which may be why it has largely escaped comment. Properly understood, however, *Erie* does not deny the ability of lawyers and judges, drawing upon precedents and practices followed in diverse jurisdictions, to distill rules that are available for legal recognition and that are sufficiently determinate to be "law-like." *Erie* simply altered prior views of the relationship between state and federal courts that engage in this process.

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3. United States v. Nat'l Steel Corp., 75 F.3d 1146, 1150 (7th Cir. 1996); accord, e.g., Smith v. United States, 328 F.3d 760, 767 n.8 (5th Cir. 2003) (quoting *Nat'l Steel Corp.*, 75 F.3d at 1150).


6. 304 U.S. 64 (1938).

7. Incautious statements to this effect abound. See, e.g., Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 595 (2003) (referring to "the void left by the collapse of 'general law'"); cf. Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1621–22 (2002) (suggesting that "modern jurisprudential views" cut against "any inquiry into the modern content of the 'general law'").
Indeed, our federal system all but requires continuing recourse to rules of general law. There are many situations in which courts and Congress alike will want to refer to some sort of national law on topics that typically are handled at the state level. Although the law of each state addresses these topics, one can certainly imagine questions as to which no individual state's law deserves controlling weight, and on which it seems more sensible to refer to a species of general law.

Part I of this Article canvasses a variety of legal areas in which modern courts do just that. As we shall see, the governing rules of decision in these areas are not entirely under the control of any federal decisionmaker, nor are they dictated by the policymakers of any single state. Instead, the substance of these rules emerges from patterns followed across a multitude of jurisdictions; the decisions of each state's courts and legislature help to determine their content, but the rules are best understood as a distillation of general American jurisprudence.

Unfortunately, modern courts lack a framework for thinking about such rules. As Part II notes, the result has been confusion and uncertainty; on many matters of great practical importance, different judges have reached sharply different conclusions about the relationship between federal law and general jurisprudence. Yet just as recognition of the persistence of general law helps us identify common themes in these disagreements, so too it suggests some ways of analyzing them. Part III explains how one particular branch of general jurisprudence can account for the patterns observed in Part I and can help resolve many of the controversies identified in Part II.

I. GENERAL LAW AS A CONTINUING SOURCE OF RULES OF DECISION

The concept of "general" law refers to rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions. In modern times, rules of this sort are rarely thought to govern legal questions of their own force; they apply only to the extent that custom or positive adoption has incorporated them into the law of a particular sovereign. In this respect, however, modern jurisprudence does not necessarily differ from its nineteenth-century forebears. Throughout the nineteenth century, the authority of the general law within any particular jurisdiction was often treated as a matter of that jurisdiction's law.  

8. See, e.g., Piatt v. Eads, 1 Blackf. 81, 82 (Ind. 1820) (observing that the general law merchant is in force in Indiana by virtue of the state's statutory reception of the common law of England); see also Chi., Milwaukee & St. Paul Ry. Co. v. Solan, 169 U.S. 133, 136 (1898) (describing a particular question as one "not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises," but emphasizing that "the law to be applied is none the less the law of the State"); The Lottawanna, 88 U.S. (21 Wall.) 558, 573 (1874) (explaining that "[e]ach [nation] adopts the maritime law, not as a code having
The distinctive feature of nineteenth-century jurisprudence instead concerned the relationship between state and federal courts. Even on issues that were within the legislative competence of a particular state, and that were governed by general law only because that state had adopted the general law into its own jurisprudence, federal judges did not feel obliged to accept whatever the state's courts had said about the content of the general law. During the era of *Swift v. Tyson,* state and federal judges exercised independent judgment on such issues.

This institutional arrangement was extremely important in practice—so important that scholars have come to associate it with the very concept of "general" law. As a logical matter, however, that concept does not compel any particular understanding of the relationship between state and federal courts. One could certainly recognize a continuing role for general law while curtailing the areas in which state and federal courts can exercise independent judgment about its content.

Post-*Erie* practice has done exactly that. When a state's highest court uses principles of general jurisprudence to resolve issues that lie within the state's legislative competence, federal judges now accept its resolution even if they would have taken a different view of the general law. The converse is true when the Supreme Court of the United States draws upon general jurisprudence to resolve issues that lie within the exclusive legislative competence of the federal government (because either the Constitution or valid federal statutes have stripped the states of legislative authority). But these developments in judicial federalism simply affect who defers to whom on questions about the content of general law. They do not mean that general law itself is dead or that no court draws upon it when articulating the rules of decision that other judges must follow. To the contrary, although *Erie* fundamentally altered the relationship between state and federal courts, it did not radically transform the source or substance of the underlying rules of decision.

This point applies to some extent even at the level of individual states. In cases of first impression, courts articulating rules of common law for a particular state surely remain influenced by principles of general jurisprudence; the fact that federal courts must follow what state courts say does not mean that state courts consider themselves free to say

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any independent or inherent force, *proprio vigore,* but as its own law, with such modifications and qualifications as it sees fit," and adding that the principles recognized as part of "the common maritime law of the world" reflect "the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems"; id. at 572 ("The adoption of the common law by the several States of this Union also presents an analogous case.").


10. See Henry J. Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 405–22 (1964) (hereinafter Friendly, In Praise of *Erie*) (discussing "the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum").
whatever they like, or that precedents from other jurisdictions are irrelevant to their project.\textsuperscript{11}

Still, the persistence of general law is clearest where courts are called upon to articulate federal rules of decision. Part I.A addresses enclaves that the Constitution itself is understood to put beyond the reach of individual states. In the absence of guidance from written federal law, people often speak as if the federal Supreme Court has been delegated broad leeway within these enclaves to enforce whatever rules it thinks best. In fact, however, the applicable rules of decision are typically grounded in some type of general law. Rather than reflecting the creativity of federal judges, they tend to mirror doctrines recognized in a majority of states or other relevant jurisdictions.

Part I.B turns to issues that arise in the interstices of federal statutes. As we shall see, the modern Congress is still understood to legislate against the backdrop of general law in a variety of ways. Notwithstanding \textit{Erie}, moreover, this approach makes perfect sense.

A. The Purest Enclaves of “Federal Common Law”

In the wake of \textit{Erie}, the Supreme Court has identified a few “narrow areas” in which, even absent any particularized delegation of authority from Congress, it can articulate substantive rules of decision that do not stem from any written federal enactment but that nonetheless have the force of federal law.\textsuperscript{12} Rules of this sort are said to govern “[matters] concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases,”\textsuperscript{13} as well as certain matters involving Indian tribes.\textsuperscript{14} On many such issues, the structure of our federal system is thought to keep state law from applying of its own force, but the Constitution has not specified the substantive rules that apply instead, and courts therefore must decide the resulting cases according to rules that they themselves articulate.\textsuperscript{15} As we shall see, however, courts do not assert total control over the substance of these rules. To the contrary, courts often derive the governing rules from patterns in

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  \item \textsuperscript{11} When trying to predict how a particular state’s courts would handle issues that they have not yet confronted, federal judges therefore routinely draw upon principles of general law. See, e.g., Hisrich v. Volvo Cars of N. Am., 226 F.3d 445, 449 n.3 (6th Cir. 2000) (noting the relevance of “restatements of law . . . and the majority rule among other states” in this situation).
  \item \textsuperscript{13} Id. (footnotes omitted).
  \item \textsuperscript{14} See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233–36 (1985).
  \item \textsuperscript{15} For the canonical argument to this effect, see Alfred Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024 (1967); see also \textit{Tex. Indus.}, 451 U.S. at 641; Richard H. Fallon, Jr. et al., Hart and Wechsler’s The Federal Courts and the Federal System 696 (5th ed. 2003) [hereinafter Hart & Wechsler] (noting the Supreme Court’s acceptance of Professor Hill’s approach in \textit{Texas Industries}).
\end{itemize}
the jurisprudence of the fifty states (or, in a few contexts, the nations of the world).

1. Interstate Disputes. — The classic illustration of the courts' approach to these enclaves is *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,{16} decided on the same day as *Erie*. There, the Supreme Court observed that "whether the water of an interstate stream must be apportioned between the two States is a question . . . upon which neither the statutes nor the decisions of either State can be conclusive."{17} Subsequent commentators have agreed that the Constitution implicitly strips the states of lawmaking power over this sort of question; if a state disagrees with neighboring states about its boundaries or its rights to the water in interstate rivers, it cannot authoritatively resolve the dispute simply by passing a statute arrogating all of the disputed territory or water to itself.{18} Still, the Constitution plainly envisions that courts may adjudicate boundary questions and other sorts of interstate disputes,{19} and courts need some rules of decision to do so. In our post-*Erie* world, those rules are classified as matters of "federal common law,"{20} meaning that even state judges are supposed to follow the federal Supreme Court's view of their substance.{21}

But the fact that the Supreme Court has authority to articulate such rules does not mean that it may legitimately make up any rules it likes. To the extent that the Court properly controls the substance of the governing rules at all, it proceeds "in a common law way,"{22} which tends to confine doctrinal movements to the "molecular" rather than the "molar" level.{23} Instead of fashioning a brand new code of interstate relations, the Court has relied heavily upon preexisting bodies of general law. *Hinderlider* itself set the pattern; as commentators have noted, the Court "derived the rule it applied from earlier cases decided on the basis of general law. *Hinderlider* itself set the pattern; as commentators have noted, the Court “derived the rule it applied from earlier cases decided on the basis of general law rules.”{24}

The Court continues to rely on such rules today. Its most celebrated recent treatment of an interstate dispute involves competing claims to

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17. Id. at 110.
18. See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1325 (1996) ("Because states are coequal sovereigns under the Constitution, neither party to an interstate dispute has legislative power to prescribe rules of decision binding upon the other." (footnotes omitted)); Hill, supra note 15, at 1076 (observing that in the field of interstate water rights, state law is preempted "not by Congress but by the Constitution").
19. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies between two or more States . . . [and] between Citizens of the same State claiming Lands under the Grants of different States . . .").
20. *Hinderlider*, 304 U.S. at 110 (internal quotation marks omitted).
jurisdiction over Ellis Island. In 1834, New Jersey and New York entered into a compact defining their boundary. The compact specified that "New York shall retain its present jurisdiction of and over . . . Ellis's island[,]" which otherwise would have fallen on New Jersey's side of the agreed line. As interpreted by the Supreme Court, however, the compact addressed only Ellis Island as it then existed and said nothing about which state would have sovereign authority over landfill later added to the island. This issue became important when the United States began using the island to process immigrants, because the federal government enlarged the island more than eightfold. New Jersey and New York eventually litigated the question of which state enjoyed sovereign authority over this filled land. When the Supreme Court resolved the dispute in New Jersey's favor a few years ago, the Court explicitly drew the substance of the governing rules from general law. In particular, the Court followed "the traditional common-law rule governing avulsive littoral changes," which jurists addressing boundary disputes had long recognized as part of the general law of nations.

2. Rights and Obligations of the Federal Government. — Cases about the federal government's rights and duties under contracts to which it is a party fit the same mold. Shortly after Erie, the Supreme Court reserved judgment on whether local or general law governed such questions. A few years later, though, the Court concluded that the Constitution federalized this field. When written federal law did not itself supply the nec-

27. Id. at 784.
28. See United States v. Bethlehem Steel Corp., 315 U.S. 289, 299 (1942) (invoking Erie for the proposition that "if these were contracts between private individuals, the law of some locality would be controlling," but declaring it unnecessary to decide whether the rules that control the federal government's contracts come instead from "general" law).
29. See United States v. County of Allegheny, 322 U.S. 174, 183 (1944) ("The validity and construction of contracts through which the United States is exercising its constitutional functions . . . present questions of federal law not controlled by the law of any State."). Nineteenth-century courts were less certain that state law cannot apply of its own force to determine the federal government's proprietary rights. See Peter W. Low & John C. Jeffries, Jr., Federal Courts and the Law of Federal-State Relations 133 (5th ed. 2004) (asserting that as a historical matter, "[e]xcept where federal statutes explicitly displaced state law, the law governing the rights and duties of the United States in proprietary transactions was the same state law that would govern the rights and duties of a private party to the same transaction"); see also United States v. Ames, 24 F. Cas. 784, 786 (C.C.D. Mass. 1845) (No. 14,441) ("Where the United States own land, situated within the limits of particular states, and over which they have no cession of jurisdiction, . . . little doubt exists, that the rights and remedies in relation to it are usually such as apply to other land-owners within the state."). But see Irvine v. Marshall, 61 U.S. (20 How.) 558, 565 (1857) (rejecting "the supposition[ ] that the control of the United States over property admitted to be their own[ ] is dependent upon locality"); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 395 (1819) ("All the property and all the institutions of the United States are, constructively, without the local, territorial jurisdiction of the individual States, in every respect, and for every purpose . . . ." (argument of counsel)); United States v. Williams, 28 F. Cas. 678, 680 (D. Me. 1830) (No. 16,724) ("I am not prepared to say that
Essary rules of decision, the Court deemed it proper to apply "the principles of general contract law."^{30}

By now, the relevance of general law in this area is a "well-settled proposition."^{31} To determine the federal government's contractual rights and obligations, courts use "standard principles of contract law" accepted in most states.^{32} The relevant principles include those articulated in the Uniform Commercial Code (UCC)—not because the statutes adopted by any particular state directly control the federal government's rights and obligations under contracts authorized by federal law, but because so many states have adopted the UCC that its provisions have become part of the applicable "general" law.^{33} The American Law Institute's Restatements of the Law (which initially were promulgated in the expectation that courts would accept them "as prima facie a correct statement of what may be termed the general common law of the United States,"^{34} and which courts still treat as serving that function after \textit{Erie}^{35})


31. \textit{Fomby-Denson v. Dep't of the Army}, 247 F.3d 1366, 1373–74 (Fed. Cir. 2001); see also, e.g., \textit{United States v. Seckinger}, 397 U.S. 203, 210–11 (1970) (observing that in interpreting a federal contract, "we are, of course, guided by the general principles that have evolved concerning the interpretation of contractual provisions such as that involved here," and applying a presumption that "is accepted with virtual unanimity among American jurisdictions").


33. See, e.g., \textit{O'Neill v. United States}, 50 F.3d 677, 684 (9th Cir. 1995) ("The Uniform Commercial Code is a source of federal common law and may be relied upon in interpreting a contract to which the federal government is a party."); see also \textit{Linear Tech. Corp. v. Micrel, Inc.}, 275 F.3d 1040, 1048 (Fed. Cir. 2001) (addressing a different context that also is governed by "the federal common law of contract," and explaining that courts should seek the "common denominator" in "th[e] body of state law" developed under "individual [state] versions of the UCC").


35. See, e.g., \textit{Kolstad v. Am. Dental Ass'n}, 527 U.S. 526, 542 (1999) (referring to "[t]he common law as codified in the Restatement (Second) of Agency"). Especially in modern times, of course, members of the American Law Institute have not viewed the Restatements as mere compendia of "majority rules"; to varying degrees, modern Restatements strive to identify the law as it should be rather than as it is, and the fact that most states have rejected a particular legal rule will not necessarily keep the relevant Restatement from embracing it. See, e.g., Charles W. Wolfram, Bismarck's Sausages and the ALI's Restatements, 26 \textit{Hofstra L. Rev.} 817, 818–19 (1998) (noting that the Restatement of the Law Governing Lawyers, for which Professor Wolfram served as the Chief Reporter, reflects the premise "that a substantive provision in a Restatement is warranted as 'restating' the law if it can be rested on the support of at least one decision in
also play a prominent role in identifying the substance of the law applicable to federal contracts.\textsuperscript{36} 

The Supreme Court has drawn on general law to answer questions about the federal government's rights and obligations in other settings too. Consider, for instance, the Court's much-maligned decision in \textit{United States v. Standard Oil Co.}\textsuperscript{37} One of the oil company's trucks had hit and injured a U.S. soldier stationed in California. The government paid for the soldier's hospitalization and continued to pay his wages during the period of his disability. Although the soldier had settled his own tort claims, the government wanted to recover its expenditures, and so it asserted an independent claim against the oil company for tortiously interfering with its relations with the soldier. The Supreme Court agreed that the defendant's liability to the federal government on this theory was "not a matter to be determined by state law," but instead was a matter of "federal common law."\textsuperscript{38} The Court further saw no reason for the applicable rule of federal common law to vary in different states.\textsuperscript{39} But when it came to determining the content of the uniform federal rule, the Court emphasized that the government was urging recognition of a "new" cause of action in a situation "not covered by traditionally established liabilities."\textsuperscript{40} In the Court's view, whether to deviate from the substance of the general law in this way was a question for Congress, not the judiciary; absent a statute creating the new liability, federal common law did not recognize it.\textsuperscript{41} 

\footnotesize{\textsuperscript{36} See, e.g., \textit{Mobil Oil Exploration & Producing Se., Inc. v. United States}, 530 U.S. 604, 608 (2000); \textit{United States v. Isaac}, 141 F.3d 477, 483 (3d Cir. 1998); \textit{John Cibinic, Jr. & Ralph C. Nash, Jr., Administration of Government Contracts} 155 (3d ed. 1995). \textsuperscript{37} 332 U.S. 301 (1947). \textsuperscript{38} Id. at 305, 308. \textsuperscript{39} See id. at 310-11. \textsuperscript{40} Id. at 314 & n.21. \textsuperscript{41} See id. at 314 ("Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours."); id. at 317 ("Until [Congress] acts to establish the liability, this Court and others should withhold creative touch.").}
Commentators have subjected this analysis to withering criticism, and indeed *Standard Oil* has no place in the account of federal common law that the Supreme Court itself often gives. On that account, once the Court has determined that federal common law governs a particular question, the substance of the applicable rule of decision “is a matter of judicial policy.” If the Court sees “little need for a nationally uniform body of law” on the issue, then it may opt simply to incorporate varying rules of state law (subject to limits designed to protect any federal interests that are at stake); if the Court instead deems uniformity appropriate, then it can “fashion a nationwide federal rule.” In standard tellings, these are the Court’s only options: If state law does not apply either of its own force or by incorporation, then the Court is responsible for crafting a nationwide rule that makes sense.

Once we recognize the persistence of general law, though, we can see the incompleteness of this account of federal common law. Whether addressing interstate disputes, the proper interpretation of government contracts, or the existence of a cause of action in cases like *Standard Oil*, the Supreme Court often applies rules that are nationally uniform but whose substance is not entirely within the Court’s control; the applicable rules reflect legal doctrines common to the states or other relevant jurisdictions, and the Court is not in charge of those inputs. Even in the purest enclaves of “federal common law,” then, the Court does not claim freedom to establish whatever rules it will. Instead, the Court often draws the substance of the governing rules of decision from continuing notions of general law.

3. Customary International Law. — Just two terms ago, in *Sosa v. Alvarez-Machain*, the Court reiterated its reluctance to “exercis[e] innovative authority over substantive law” even in enclaves of federal common law. The case grew out of an attempt by the United States to prosecute Humberto Alvarez-Machain for his alleged participation, in Mexico, in the torture and murder of an agent of the federal Drug Enforcement Administration (DEA). When discussions with the Mexican government failed to produce Alvarez’s extradition, DEA officials paid a group of Mexican citizens, including Jose Francisco Sosa, to seize Alvarez and bring him to the United States for trial. After winning acquittal in the

42. See, e.g., Hart & Wechsler, supra note 15, at 703–04 (complaining that *Standard Oil* established “a federal rule of no liability[] without evaluating the . . . merits of that rule”); Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 957–58 (1986) (“This holding seems plainly erroneous in that the resulting rule serves no conceivable federal interest. If the court is reluctant to create a federal rule of liability, what is the federal interest in a uniformity that serves only to prevent the United States from recovering under state rules?” (footnotes omitted)).


44. Id. For further discussion of the idea that “federal common law” sometimes simply incorporates varying rules of state law, see infra Part III.C.3.

45. See, e.g., Low & Jeffries, supra note 29, at 135.

ensuing prosecution, Alvarez sued Sosa and other defendants in a federal district court, seeking damages for his abduction.47

When the case reached the Supreme Court, Justice Souter’s majority opinion considered whether the Alien Tort Statute, which says that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations,”48 implicitly gives plaintiffs a federal cause of action to recover damages for such torts.49 The Court deemed the statute “strictly jurisdictional”; when it was enacted as part of the Judiciary Act of 1789, people had not understood it to create any causes of action, but simply to give federal trial courts cognizance over certain claims based on the general law of nations.50 Justice Souter went on to say that “the prevailing conception of the common law has changed since 1789,”51 but he suggested that federal law has taken over the substantive work that the First Congress expected the general law to do. In particular, he indicated that the violation of certain kinds of “international law norm[s]” will support “private claims under federal common law”—at least when the relevant conduct occurs beyond the legislative jurisdiction of any American state.52

By treating these norms as “federal common law,” the Court may well have been rejecting a view recently advanced by Ernest Young. After noting that nineteenth-century jurists regarded the customary law of nations as a species of general law on which state and federal courts could exercise independent judgment, Professor Young argues that courts should take the same view today; just as state courts do not necessarily have to accept whatever the federal judiciary says about the content of a foreign country’s law, so too Professor Young suggests that they should be free to disagree with the Supreme Court’s pronouncements about the customary norms that are part of modern-day international law.53 The Court’s deci-

47. For the Court’s account of the underlying facts, see id. at 697-99.
49. See Sosa, 542 U.S. at 712-14.
50. Id. at 712-13, 729.
51. Id. at 725.
52. Id. at 732. I add the qualification about state legislative jurisdiction because Alvarez’s abduction occurred outside the United States, and hence at least arguably beyond the reach of any American state’s lawmaking powers. The Supreme Court might prove more willing to apply “federal common law” to extraterritorial conduct of this sort than to matters that are otherwise subject to state regulation. After all, to say that a particular substantive rule is a matter of “federal common law” is ordinarily to say that it preempts conflicting rules of state law. The Sosa majority did not address the extent to which customary international law will have this preemptive effect in areas over which the states have legitimate legislative authority. For instance, if customary international law were eventually understood to prohibit capital punishment, would the Court hold states powerless to impose the death penalty within their borders? See Hart & Wechsler, supra note 15, at 755 (raising this sort of question before Sosa); cf. supra text accompanying note 10 (noting Erie’s implicit distinction between matters that are within the legislative competence of states and matters that are not).
53. See Ernest A. Young, Sorting Out the Debate over Customary International Law, 42 Va. J. Int’l L. 365, 467 (2002) (“[C]ustomary international law should be viewed as
sion to classify those norms as part of the new federal common law suggests that it has a different view of the proper relationship between state and federal courts. But the Court does not have a different view of the source of the governing rules. Like Professor Young, the Court understands those rules to reflect a species of general law—"principle[s] . . . that the civilized world accepts as binding customary international law."\(^{54}\)

Indeed, for all its talk of changes in our conception of the common law, the Court specifically asserted that it continues to identify the substance of the governing principles in much the same way that it did during the days of \textit{Swift v. Tyson}. To determine "the current state of international law," the Court said, one must "look[] to those sources we have long, albeit cautiously, recognized."\(^{55}\) Quoting at length from a pre-\textit{Erie} case, the Court indicated that the relevant rules derive from ""the customs and usages of civilized nations,"" which can be identified in part by consulting the works of learned jurists and commentators from around the world, ""not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.'"\(^{56}\) Using this method, the Court concluded that federal common law does not incorporate the purported norm against "arbitrary arrest" that Alvarez was invoking, because that norm has "less definite content and acceptance among civilized nations than the historical paradigms familiar when [the Alien Tort Statute] was enacted."\(^{57}\) Thus, in \textit{Sosa} as elsewhere, the Court did not treat the applicability of federal common law as a license for unfettered judicial creativity, but rather as a mandate to investigate the substance of the general law.

4. \textit{Maritime Law}. — Much the same pattern has played out in the area of maritime law. At least with respect to the high seas, the Supreme Court has long understood the Constitution to displace the local law of individual states;\(^{58}\) to whatever extent the United States can regulate vessels on the high seas, that authority resides chiefly at the national level.\(^{59}\)

\(^{54}\) \textit{Sosa}, 542 U.S. at 737.

\(^{55}\) Id. at 733.

\(^{56}\) Id. at 734 (quoting \textit{The Paquete Habana}, 175 U.S. 677, 700 (1900)).

\(^{57}\) Id. at 732, 734.

\(^{58}\) See \textit{Lord v. S.S. Co.}, 102 U.S. 541, 544 (1880) (observing that "[n]avigation on the high seas is necessarily national in its character" and calling it "a matter of 'external concern,' affecting the nation as a nation in its external affairs"); see also \textit{Chisholm v. Georgia}, 2 U.S. (2 Dall.) 419, 475 (1793) (Jay, C.J.) (calling the high seas "the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties"). But cf. \textit{The Hamilton}, 207 U.S. 398, 405 (1907) (noting that the law of nations treats a vessel at sea as an extension of the nation to which it belongs, and suggesting that American federalism leaves some limited room for states to regulate conduct on vessels hailing from their ports or owned by their domiciliaries).

\(^{59}\) As a matter of domestic constitutional law, the explicit provisions of Article I give Congress broad but not unlimited authority on this subject. See U.S. Const. art. I, § 8, cl.
Again, though, written federal law does not supply all of the necessary rules of decision. As in other fields that the Constitution has been understood to federalize, courts use general law to fill the resulting vacuum.\textsuperscript{60}

Things get more complicated when one leaves the high seas and enters the territorial waters of a particular state, because the Constitution has not been understood to banish state law entirely from the maritime field. The general maritime law itself requires vessels to obey "local usages of navigation," and the Supreme Court has traditionally analogized some state and local statutes to such usages.\textsuperscript{61} Federal statutes dating back to the First Congress also contemplate the application of state law to some questions arising in maritime contexts.\textsuperscript{62} Even in the absence of such statutes, state law apparently can govern certain maritime questions of its own force.\textsuperscript{63}

10 (empowering Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"); id. cl. 11 (empowering Congress to "make Rules concerning Captures on Land and Water"); id. cl. 8 (empowering Congress "[t]o regulate Commerce with foreign Nations" as well as "among the several States"); see also The Passenger Cases, 48 U.S. (7 How.) 283, 414 (1849) (Wayne, J.) ("[t]he power in Congress to regulate commerce with foreign nations and among the several States includes navigation upon the high seas . . . ."). In addition to these explicit provisions, current doctrine maintains that the Constitution implicitly gives Congress legislative power coextensive with the admiralty jurisdiction of the federal courts. See Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214, 1230–37 (1954) (tracing the origins of this idea).


61. Cushing v. Owners of the Ship John Fraser, 62 U.S. (21 How.) 184, 187 (1858) (observing by way of illustration that "local authorities have a right to prescribe at what wharf a vessel may lie, . . . where she may unload or take on board particular cargoes, where she may anchor in the harbor, . . . and what description of light she shall display at night to warn the passing vessels of her position").

62. For example, in 1789, Congress enacted legislation stating that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress. Act of Aug. 7, 1789, ch. 9, § 4, 1 Stat. 53, 54; see also 28 U.S.C. § 1333 (2000) (setting out the modern version of the "saving to suitors" clause, which dates back to the Judiciary Act of 1789); Ernest A. Young, Preemption at Sea, 67 Geo. Wash. L. Rev. 273, 282 (1999) (observing that "[s]tate law enters into maritime cases" through this clause). But cf. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920) (asserting limits on Congress's ability to authorize the application of substantive state legislation in the maritime field).

63. See, e.g., Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 216 (1996) (holding that "the damages available for the jet ski death of Natalie Calhoun [in territorial waters] are properly governed by state law," which can validly supplement the remedies available under general maritime law); Cooley v. Bd. of Wardens, 55 U.S. (12 How.) 299, 318–21 (1851) (indicating that state pilotage laws operate of their own force rather than by incorporation into federal law); cf. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 373 (1959) (discussing "the highly intricate interplay of the States and the National Government in their regulation of maritime commerce," and asserting that "[a]lthough the corpus of admiralty law is federal in the sense that it derives from the implications of
According to the Supreme Court, though, the constitutional provisions federalizing admiralty jurisdiction were meant to ensure that vessels do not face radically different legal regimes as they move from port to port. Not only does the general maritime law therefore apply within each state’s territorial waters, but the Court has held that no state can supplement it in a way that “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”

As our Constitution has come to be interpreted, any power along those lines resides with Congress rather than the individual states. Even within a state’s own territorial waters, then, the Constitution has at least submerged the local law of individual states, leaving room for courts to draw the applicable rules of decision from general law instead.

In fact, maritime cases implicate two different species of general law. Some issues continue to trigger what nineteenth-century courts called “that universal marine law which is common to all commercial and maritime nations.” On questions of this sort, early American courts routinely referred to precedents and authorities from other seafaring countries, on the theory that jurists around the world were engaged in a common project of fleshing out “the customary law of the sea.” As American decisions about the content of this universal law accumulated, “overt reliance on foreign authorities diminished”; rather than investigating international customs afresh in each case, American jurists could simply rely on their past decisions about the substance of those customs. But the universal maritime law as applied by American courts still resembles that applied by foreign courts, and American jurists continue to

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64. S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917); see also Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd., 125 S. Ct. 385, 392-96 (2004) (holding that state law cannot control interpretation of maritime contracts unless the matter in dispute is “inherently local”); The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874) (“It certainly could not have been the intention [of the Constitution] to place the rules and limits of maritime law under the disposal and regulation of the several States . . . .”).

65. The Rebecca, 20 F. Cas. 373, 374 (D. Me. 1831) (No. 11,619).

66. Id. at 375-76; see also Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 46 (2d ed. 1975) (noting that early American courts “looked on the maritime system they were administering as international in scope” and issued opinions that “are replete with citations to the continental European authorities, not for persuasive analogy but ‘as evidence of the general marine law’” (quoting Morgan v. Ins. Co. of N. Am., 4 U.S. (4 Dall.) 455, 458 (Pa. 1806))).


68. See id. at 46-47.
think of some principles of maritime law as more international than domestic.\footnote{69}

Other questions that arise in a maritime context are governed not by universal principles but by the law of a particular country, which American courts use a multifactor choice-of-law test to identify.\footnote{70} When the country selected by this test is the United States, however, the peculiarities of American federalism sometimes require application of another sort of general law—a law that is "general" to the American states even if not to the world as a whole.

The recent case of \textit{Wells v. Liddy} helps illustrate this point.\footnote{71} Proceeding in a federal district court, Ida Wells sued G. Gordon Liddy for allegedly defaming her in various speeches, including one delivered on a cruise ship. The record did not reveal the flag under which the ship had sailed, but both parties were American citizens and the federal courts seemed willing to assess the speech under American concepts of defamation law. The allegedly defamatory remarks, however, had not been made within the territorial waters of any particular state.\footnote{72} Under these circumstances, the Fourth Circuit held that "general maritime law" applied and that it incorporated "general common law tort principles rather than the specific law of a single state."\footnote{73} The court therefore drew the applicable rules of defamation law from the Restatement (Second) of Torts.\footnote{74} Other courts have followed the same basic analysis; in a host of different maritime contexts with a nexus to the United States, courts have explicitly sought the governing rules of decision in "general common law rather than state law," and they have used the Restatements to help identify the governing principles.\footnote{75}

\footnote{69} See, e.g., \textit{Norfolk S. Ry.}, 125 S. Ct. at 396 ("[W]hen a [maritime] contract... may well have been made anywhere in the world," it 'should be judged by one law wherever it was made.'" (quoting \textit{Kossick v. United Fruit Co.}, 365 U.S. 731, 741 (1961))); \textit{Am. Dredging Co. v. Miller}, 510 U.S. 443, 453 (1994) (asserting that the substantive law of admiralty "is supposed to apply in all the courts of the world"); \textit{Senator Linie GmbH & Co. v. Sunway Line, Inc.}, 291 F.3d 145, 170 (2d Cir. 2002) (emphasizing "the importance of international uniformity in the laws governing the maritime trade").

\footnote{70} See \textit{Lauritzen v. Larsen}, 345 U.S. 571, 582-93 (1953).

\footnote{71} 186 F.3d 505 (4th Cir. 1999).

\footnote{72} For the factual background of the case, see id. at 512-18.

\footnote{73} Id. at 524-25.

\footnote{74} See id. at 525.

\footnote{75} \textit{Marastro Compania Naviera, S.A. v. Canadian Mar. Carriers, Ltd.}, 959 F.2d 49, 53 (5th Cir. 1992) (using the Restatement (Second) of Torts to help identify "the law of maritime trespass"); \textit{Vickers v. Chiles Drilling Co.}, 822 F.2d 555, 557-58 (5th Cir. 1987) (consulting the Restatement (Second) and "the virtually universal rule in all states" to identify the "general federal maritime law" of products liability); see also \textit{Wallis v. Princess Cruises, Inc.}, 506 F.3d 827, 841 (9th Cir. 2002) (noting that the Restatement (Second) of Torts is not the only source of maritime tort law, but recognizing that "it has been regularly employed by other courts to evaluate intentional infliction of emotional distress claims in federal maritime cases," and relying on it in the context of such a claim).
Even *Moragne v. States Marine Lines, Inc.*—a case that commentators have used to illustrate the Supreme Court's relatively unfettered control over the substance of federal common law—\(^76\)—is best seen as drawing upon "general" law. In an 1886 case called *The Harrisburg*, the Court had held that the unwritten maritime law did not create a cause of action for wrongful death.\(^77\) A federal statute enacted in 1920 conferred such a cause of action for wrongful deaths that occurred on the high seas, and a growing number of state statutes provided causes of action for wrongful deaths that occurred on navigable waters within a state's territorial limits.\(^78\) But if no statutory cause of action was available, the rule articulated in *The Harrisburg* prevented wrongful-death claimants from recovering under general maritime law. In 1970, *Moragne* changed this rule. To justify its new rule, however, the Court emphasized that "every State today has enacted a wrongful-death statute," and that Congress had done the same for railroad employees, merchant seamen, and people on the high seas.\(^80\) According to the Court, "the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law," and federal maritime law should conform to this new principle of general American jurisprudence.\(^81\)

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In emphasizing the continuing relevance of general law to the substance of federal common law, I do not mean to suggest that judges never assert their own creative control over the rules of decision that they apply. Any such suggestion would be silly; everyone can think of cases in which judges seemed to base the content of federal common law largely on their own sense of sound policy, without regard to whether the resulting rules were widespread in American jurisprudence.\(^82\) To a much greater extent than is commonly assumed, though, patterns of general jurisprudence form the basis for the rules of decision that judges apply in enclaves of federal common law. In a great many cases, including not only

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79. See *Moragne*, 398 U.S. at 393–94.
80. Id. at 390.
81. Id. at 393; see also Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990) (noting that "Congress and the States have legislated extensively" on the subject of wrongful death and asserting that "an admiralty court should look primarily to these legislative enactments for policy guidance"); id. at 36 ("We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of [the federal statutes].").
maritime matters but also interstate disputes and cases about government contracts, modern-day courts continue to draw the governing rules of decision from a species of general law, distilled from the practices and precedents followed in many different jurisdictions.

On some issues, of course, those practices and precedents are too varied for a determinate rule of general law to emerge. The Supreme Court asserts correspondingly more freedom when articulating rules of federal common law to govern such issues. Even then, however, the practices that other jurisdictions follow tend to constrain the options that the Court considers. The substance of federal common law is thus intimately connected with patterns of general jurisprudence.

B. General Law as a Backdrop for Federal Statutes

The concept of general law also remains important to the interpretation and application of federal statutes. Just as general law tends to fill vacuums created by the Federal Constitution, so too it tends to fill vacuums created by Congress. Thus, when a federal statute preempts state law throughout a particular field, modern-day courts frequently use general jurisprudence to answer questions on which Congress has provided no other guidance. Likewise, when a federal statute refers to preexisting legal concepts that it does not itself define, or when its application requires answers to questions that written federal law does not resolve, courts often assume that Congress meant to incorporate uniform rules of general law.

1. The Use of General Law to Fill Gaps Created by Field Preemption. — Although Congress often lets state and federal law operate concurrently, it sometimes strips the states of legislative authority over particular fields. The Employee Retirement Income Security Act (ERISA), for instance, explicitly displaces "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. Some older federal statutes have been understood to accomplish the same sort of "field preemption" by implication. But while these statutes displace state law throughout the fields that they occupy, they do not always supply their own rules of decision for each and every issue that might arise

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83. See, e.g., McDermott, Inc. v. AmClyde, 511 U.S. 202, 208–17 (1994) (noting splits of authority about the extent to which a settlement with one tortfeasor reduces the amount for which joint tortfeasors are liable, and choosing a federal rule for use in maritime cases by picking among the three competing approaches identified in the Restatement (Second) of Torts); id. at 209 n.8 ("We are unwilling to consider a rule that has yet to be applied in any jurisdiction.").

84. 29 U.S.C. § 1144(a) (2000); see also Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring) (noting longstanding uncertainty about this provision's precise meaning, but suggesting broad agreement that ERISA at least federalizes the field of pension plan regulation).

within those fields. To handle such issues, courts often draw the necessary rules of decision from general law.

The Supreme Court established this pattern well before *Erie*. Consider, for instance, the Federal Employers' Liability Act (FELA), a 1908 statute making interstate railroads liable for injuries or deaths suffered by their employees in interstate commerce as a result of the negligence of the railroad's other employees, agents, or officers. From the start, the Court understood this statute not only to create a federal cause of action, but also to displace parallel state causes of action and to occupy the entire field of "the liability of railroad companies to their employées injured while engaged in interstate commerce." At the same time, the Court understood the statute to incorporate (and thereby federalize) various background principles of general jurisprudence, including principles about the proper measure of damages, the availability of "assumption of the risk" as a defense to liability, and the survival of personal injury claims after the injured party's death.

Instead of resting on *Swift v. Tyson*, these decisions reflected an interpretation of the FELA itself. As a result, *Erie* has not undercut them. In modern-day FELA cases, the Court continues to use general law to handle questions that the statute prevents individual states from answering but that Congress has not otherwise addressed.

The Court has taken the same approach to a variety of more recent statutes that also federalize entire fields without supplying comprehensive rules of decision. To fill gaps in ERISA, for instance, the Court has drawn heavily upon the general jurisprudence of trusts. As the Second Circuit recently noted, "in ERISA cases, state law does not control. Instead, general law controls."
eral common law principles apply."94 Likewise, ever since the Supreme Court read the Labor Management Relations Act to federalize the interpretation of collective bargaining agreements,95 judges have routinely invoked "general contract principles" to answer questions that the Act does not itself address.96

2. *The Use of General Law to Define Particular Terms in Federal Statutes.* — Even in the absence of field preemption, courts routinely draw upon general jurisprudence to understand particular terms in federal statutes. When Congress uses a term that it does not define but that is familiar to state law, courts occasionally conclude that the term is a mere placeholder for varying definitions supplied by the local law of individual states.97 But it is much more common for courts to seek a uniform federal definition of the term. When a definition can be distilled from general American jurisprudence, moreover, courts typically presume that Congress was using the term in that sense.

Examples of this phenomenon are legion.98 To pick just one, consider the Copyright Act of 1976, which establishes special rules for works "prepared by an employee within the scope of his or her employment."99

According to the Supreme Court, Congress intended those words to refer to "the general common law of agency, rather than . . . the law of any particular State."\textsuperscript{100} When deciding whether the person who prepared a work was an "employee," the Court therefore gives no special weight to the master-servant law of the state where the work was prepared; instead, the Court consults statements of general law (such as the Restatement (Second) of Agency).\textsuperscript{101} The Court takes the same approach to a variety of federal employment statutes, including the important laws that protect "employees" (but not independent contractors) against discrimination based on race, sex, age, or disability. In all these contexts, the Court understands the key statutory term to have a uniform meaning drawn from "the general common law of agency."\textsuperscript{102}

The Court was not always so fond of this approach. In the 1944 case of \textit{NLRB v. Hearst Publications, Inc.}, it specifically held that the term "employee" in the National Labor Relations Act did \textit{not} draw its meaning from general jurisprudence; rather than trying to identify "a sort of pervading general essence distilled from state law," the Court instead asserted authority to develop a more flexible definition informed by the Act's supposed policies.\textsuperscript{103} But Congress quickly overrode \textit{Hearst Publications}, enacting an amendment whose "obvious purpose" was "to have . . . the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."\textsuperscript{104} In keeping with the lessons of this episode, the current Court is ordinarily content to assume that when Congress uses terms familiar to the common law, it intends those terms to have the meaning suggested by general jurisprudence.\textsuperscript{105}

Notwithstanding \textit{Erie}, this use of general law makes sense. Even when Congress uses terms familiar to the law of the fifty states, it would be strange for the meaning of those terms to come from the local law of any particular state; whatever policy goals Congress is trying to balance, there is rarely much reason for Congress to establish federal rules of decision whose content in each state depends on how that state happens to define the terms that the federal statute uses. At the same time, Congress's decision to use common terms, and to refrain from giving them any special

\textsuperscript{101} Id. at 739–40, 751–52 (citing Restatement (Second) of Agency §§ 220, 228 (1958)).
\textsuperscript{103} 322 U.S. 111, 120–32 (1944).
\textsuperscript{105} See Darden, 503 U.S. at 524–25.
definition, suggests that Congress was content with the meaning supplied by general American jurisprudence.

Of course, the fact that these terms draw their meaning from general jurisprudence does not preclude them from referring to legal relationships created by the local law of individual states. To the contrary, proper application of the definitions supplied by general jurisprudence will often implicate matters that lie outside the province of federal law. The statutes that we have just been considering are modest illustrations of this phenomenon: The definition of "employee" that courts have derived from the Restatement (Second) of Agency asks whether the hiring party can "control the manner and means by which the [project] is accomplished" and "assign additional projects to the hired party,"106 and the existence of those powers in any particular case may well depend on the contract law of a single state. But while application of the term "employee" in the relevant federal statutes will therefore require reference to local law, the definition of the term itself comes from general jurisprudence.107

3. Other Contexts in Which Courts Read General Law into Federal Statutes. — Even apart from the definition of specific terms, application of a federal statute may well require answers to questions that Congress has not explicitly addressed and that state law frequently governs in other contexts. To answer such questions, courts sometimes use the law of individual states, either on the theory that the federal statute implicitly incorporates varying rules of local law108 or on the theory that the questions at issue lie entirely beyond the statute's reach and that local law therefore applies of its own force.109 Quite commonly, however, courts instead in-

106. Cmty. for Creative Non-Violence, 490 U.S. at 751.

107. The same pattern is apparent in judicial interpretation of the Internal Revenue Code. See generally Note, The Role of State Law in Federal Tax Determinations, 72 Harv. L. Rev. 1350 (1959). Consider, for example, the provision creating liens upon "all property and rights to property" belonging to a person who fails to pay accrued federal taxes after proper demand. 26 U.S.C. § 6321 (2000). In order to apply this provision, courts obviously must identify the legal rights that the local law of a particular state or foreign country has given the taxpayer. But courts need not worry about whether the local law of the relevant jurisdiction would itself classify those rights as "property." As the Supreme Court has emphasized, "[s]uch state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien." United States v. Craft, 535 U.S. 274, 279 (2002); accord Drye v. United States, 528 U.S. 49, 58 (1999).

108. See N. Star Steel Co. v. Thomas, 515 U.S. 29, 33 (1995) (addressing the limitations period for a federal cause of action); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991) (holding that if the Investment Company Act of 1940 authorizes shareholder derivative suits to enforce its prohibition on materially misleading proxy statements, the statute incorporates state law to determine whether shareholders must first make a demand upon the board of directors).

voke doctrines of general law associated with the kinds of rights and duties that the statute creates.

Where Congress does not appear to have deliberately overridden principles of general jurisprudence, courts routinely read those principles into seemingly unqualified statutory language. In one recent case, for instance, the Supreme Court indicated that when Congress creates a federal cause of action analogous to a tort claim, "it legislates against a legal background of ordinary tort-related vicarious liability rules" and should typically be understood to have "intend[ed] its legislation to incorporate those rules." Thus, the Court has self-consciously used "the general common law of agency, rather than the law of any particular State," to determine the circumstances under which Title VII of the Civil Rights Act of 1964 makes an employer responsible for the hostile work environment created by an employee's supervisor and the circumstances under which the employer will be vicariously liable for punitive damages. By the same token, federal statutes creating tort-like causes of action are read to imply requirements of proximate causation and other "well-accepted common-law rules applied in comparable litigation." Similarly, federal statutes defining crimes are commonly read to incorporate "general common law principles regarding mens rea."

The presumption that Congress usually acts in conformity with generally accepted legal principles is a modern incarnation of the old canon against derogation of the common law. Importantly, however, idiosyncratic rules of local law do not form the backdrop for federal legislation in any similar way. In this respect as in others, courts interpret federal statutes against a continuing backdrop of general rather than purely local law.

Again, there is nothing odd about the idea that the modern Congress still legislates against the backdrop of general law. To be sure, modern state legislatures can usually be assumed to draft statutes against the backdrop of the common law as it is understood and applied in their

110. Meyer v. Holley, 537 U.S. 280, 285 (2003); see also, e.g., Dura Pharms. v. Broudo, 125 S. Ct. 1627, 1632-33 (2005) (noting that federal claims for securities fraud resemble certain tort claims, and using the "judicial consensus" reflected in the Restatement (Second) of Torts to flesh out the elements of the federal cause of action).
114. United States v. Wilson, 133 F.3d 251, 261 (4th Cir. 1997). For the classic illustration, which relies heavily on patterns of jurisprudence in what were then the forty-eight states, see Morissette v. United States, 342 U.S. 246, 260-62 (1952).
115. See, e.g., Arabian Am. Oil Co. v. Scarfone, 939 F.2d 1472, 1478 (11th Cir. 1991) (refusing to read RICO to comport with an alleged doctrine of Florida law about how to handle overlaps between tort and contract claims).
particular state; if the legislature of Virginia enacts a statute that appears to incorporate background concepts from the law of agency, courts are likely to presume that it had Virginia's version of agency law in mind. When Congress enacts a similar statute, however, courts confront a broader array of interpretive possibilities. Perhaps Congress meant either to incorporate or to leave undisturbed the local agency law of particular states, so that cases arising in Virginia implicate a somewhat different conception of agency than cases arising in Massachusetts. But it is also possible that Congress meant to incorporate rules of general law, with the result that the conception of agency applicable to cases under the statute is uniform throughout the country even though it is informed by agency law as it stands in each of the states. Other American legislatures that operate outside the confines of any particular state have explicitly adopted this sort of general law,116 and there is no reason to presume that Congress would never follow suit.

II. CIRCUIT SPLITS ABOUT THE INCORPORATION OF GENERAL LAW INTO FEDERAL LAW

Both in the penumbras of federal statutes and in purer enclaves of federal common law, it is possible for written federal law to fail to supply answers to questions that seem to trigger federal rules of decision. Part I showed that in such situations, courts often draw the substance of the governing rules from a species of general law, distilled from the overlapping practices of many different jurisdictions. Unfortunately, post-Erie jurisprudence has yet to develop a solid analytical framework for identifying the issues that can appropriately be resolved in this way. In the absence of such a framework, judges have relied heavily upon their own intuitions, and those intuitions vary from judge to judge. The result has been a mish-mash of inconsistent decisions.

Part III will try to construct a sounder approach. Before we consider solutions, though, it seems appropriate to establish that a problem exists. This Part aims to show three things: (1) Questions about the relationship between federal law and background rules of general law cut across a broad variety of contexts; (2) these questions are of great practical impor-

116. The Code of the U.S. Virgin Islands, for instance, starts with a wholesale adoption of a species of general law:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

tance; and (3) they have generated deep and ongoing divisions in the courts.

A. Rules Governing the Disposition of Federal Causes of Action

We can start with some seemingly simple issues of everyday recurrence. When federal law creates a private cause of action, it gives potential plaintiffs a species of property that they would not otherwise have had. To what extent should federal law also be understood to regulate the disposition of this property? When potential plaintiffs purport to release or transfer their federal causes of action, should they expect the contract law of a particular state to govern their agreements, or does the need to protect federal policy imply the applicability of some sort of federal rule? If federal law is applicable, to what extent should common themes in the contract law of the fifty states dictate its substance? These questions have generated enormous confusion in the case law.

1. Settlement Agreements. — Even in the absence of any relevant statutory provisions, courts routinely assume that federal law incorporates principles of general jurisprudence to govern the “releasability” of federal claims. Thus, federal statutes creating causes of action ordinarily are not understood to preclude out-of-court settlements of the claims that they create. Causes of action in the enclaves of pure federal common law are also releasable in this sense. But there are ongoing disputes about how much else federal law should be understood to say about the settlement of federal claims. As courts themselves are beginning to recognize, case law on this topic is in “national disarray.”

The fact that federal law typically permits valid settlement contracts to defeat federal causes of action does not automatically mean that federal law must determine whether a purported settlement agreement is a valid contract or how it should be interpreted. Just as state law can con-


119. See, e.g., Wilson v. Mar. Overseas Corp., 150 F.3d 1, 5 n.3 (1st Cir. 1998).

trol the disposition of other forms of property created by Congress, so too state law might determine the enforceability and meaning of agreements involving the release of a federal cause of action. Some courts have so held; absent contrary guidance from Congress or the Constitution, they say that the local contract law of individual states governs those issues of its own force.122

Several Supreme Court opinions, however, have understood the policy behind at least some federal causes of action to bring at least some of these issues within the domain of federal law. The most famous example involves the FELA. As Part I.B.1 noted, judges have long understood the FELA to federalize a variety of topics that the statute does not explicitly address.123 In *Dice v. Akron, Canton & Youngstown Railroad Co.*, the Court added the validity of release agreements to this list.124 Fearful that "the federal rights affording relief to injured railroad employees . . . could be defeated" if the enforceability of releases obtained by fraud were left to state law, and convinced that the FELA's underlying purposes required uniformity in this area, the Court concluded that the validity of agreements purporting to release FELA claims "is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law."125 As for the content of the federal rule, the Court drew upon the general tenor of "modern judicial and legislative practice" to conclude that "a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and ma-

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121. See, e.g., Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 472 n.8 (3d Cir. 1986) ("A trademark licensing agreement is a contract to be interpreted and enforced under state law.").

122. See Abbott Labs. v. CVS Pharmacy, Inc., 290 F.3d 854, 857 (7th Cir. 2002) ("[I]nterpretation of a settlement contract is governed by state law even if the settled claim arose under federal law . . . ."); Resnick v. Uccello Immobilien GmbH, 227 F.3d 1347, 1350 & n.4 (11th Cir. 2000) (holding that "federal common law does not apply" and that "state contract law directs our analysis" of whether to enforce a liquidated-damages clause in an agreement settling claims under the Americans with Disabilities Act); United Commercial Ins. Serv. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992) (agreeing that state law governs the interpretation of settlement agreements "even though the underlying cause of action is federal"); see also Morris v. City of Hobart, 39 F.3d 1105, 1112 & n.6 (10th Cir. 1994) (holding that a suit for breach of a settlement contract is "an action created by state law" and does not trigger federal-question jurisdiction even when the settled claim arose under Title VII); cf. Michael E. Solimine, Enforcement and Interpretation of Settlements of Federal Civil Rights Actions, 19 Rutgers L.J. 295, 318-39 (1988) (advocating "a presumption that state contract law will govern the interpretation of settlements of federal civil rights actions").

123. See supra notes 88–92 and accompanying text.


125. Id. at 361–62. The Court had earlier taken a similar approach to the release of seamen's claims under admiralty law and under the Jones Act, a 1920 statute that extended the FELA's cause of action to merchant seamen injured in the course of their employment. See Garrett v. Moore-McCormack Co., 317 U.S. 239, 243–48 (1942).
terial statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release."

More recently, the Court concluded that federal law also addresses the validity of agreements purporting to release claims under 42 U.S.C. § 1983, at least when local prosecutors obtain those releases in exchange for dismissing criminal charges against the claimant. Even more clearly than in Dice, moreover, the Court understood § 1983 to handle this issue by incorporating a species of general law—"traditional common-law principles" of the sort found in the Restatement (Second) of Contracts.127

The FELA and § 1983 arguably incorporate a broader swath of common-law rules than most federal statutes.128 Taking their cue from these cases, however, some lower courts have assumed that whenever Congress creates a federal cause of action, it ordinarily means federal law to encompass not only the circumstances in which one person initially becomes liable to another, but also a host of questions about agreements purporting to release that liability.129 The same courts have held that federal law also governs releases of the causes of action that are recognized in the specialized enclaves of pure federal common law.130 As the Fifth Circuit has summed up its doctrine, "[n]ormally the release of federal claims is governed by federal law."131

Some opinions that take this view still end up assessing the validity and meaning of a purported release under the contract law of a particular state, on the theory that the applicable rules of federal law simply incorporate local law.132 But other opinions opt instead for uniform

126. Dice, 342 U.S. at 362 (basing this conclusion in part on "cases collected in note, 164 A.L.R. 402–415").
129. See Quint v. A.E. Staley Mfg. Co., 246 F.3d 11, 14 (1st Cir. 2001) ("[W]hether there is an enforceable settlement [of a claim under a federal statute] is a question of federal, rather than state, law."); Macktal v. Sec'y of Labor, 923 F.2d 1150, 1157 n.32 (5th Cir. 1991) ("The settlement involves a right to sue derived from a federal statute; federal law, therefore, governs the validity of the agreement."); Salmeron v. United States, 724 F.2d 1357, 1361 (9th Cir. 1983) ("The validity and interpretation of a release of significant federal rights is governed by federal law."); Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113, 1115 (2d Cir. 1977) (calling it "well established" that "federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action").
130. See, e.g., Mid-S. Towing Co. v. Har-Win, Inc., 733 F.2d 386, 389 (5th Cir. 1984) ("Because the claims in this case are premised on federal general maritime law, we apply federal law to determine the validity of the agreement to settle the claims.").
132. See infra notes 279–281 and accompanying text.
rules. Some judges make that choice on a statute-specific basis; others seem to think that uniformity should be the default rule, lest varying principles of state law frustrate the federal interests that are at stake whenever Congress creates a federal cause of action. Among the latter group, some judges suggest that uniform federal rules govern both the validity and the interpretation of agreements involving the release of federal claims, while others may see a distinction between questions about whether an enforceable agreement exists and questions about what the agreement means. But to whatever extent courts understand federal law to incorporate uniform rules about the release of federal causes of action, they seem inclined to draw the substance of those rules from principles of general jurisprudence (as articulated, for instance, in the Restatement (Second) of Contracts).

The circuit splits on the extent to which local or general law governs the release of federal causes of action are not limited to questions of contract law. They also reach such matters as an attorney's power to release a client's claims and the effect of settlement agreements negotiated by attorney

133. See, e.g., United States v. Northrop Corp., 59 F.3d 953, 960–69 (9th Cir. 1995) (discussing the validity of agreements purporting to bar the parties from bringing qui tam suits under the False Claims Act, and concluding that "a uniform federal common law rule is necessary to protect the purposes behind 1986 amendments to that statute.

134. See, e.g., Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337, 1340 (9th Cir. 1992) (expressing concern that "federal statutory rights could be easily defeated if state law could be used to control the incidents of those rights and the defenses to them") (quoting Locasfrance, 558 F.2d at 1115 n.3); Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1316 n.27 (5th Cir. 1983) (indicating that, in general, "a release which implicates a federally created statutory claim[ ] should be construed in light of a single federal rule rather than by application of various state rules"); Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1208–09 (5th Cir. 1981) (enforcing oral settlement of a Title VII claim despite a state statute that recognized only written settlement agreements, and suggesting that "absorption of a state rule" is not appropriate "where . . . the rights of the litigants and the operative legal policies derive from a federal source").

135. See, e.g., Chaplin v. NationsCredit Corp., 307 F.3d 368, 372 (5th Cir. 2002) (observing that "federal common law controls the interpretation of a release of federal claims" and construing the relevant agreement without reference to state law); Smith v. Amedisys Inc., 298 F.3d 434, 441 (5th Cir. 2002) (agreeing that "the interpretation and validity of a release of claims under Title VII is governed by federal law" and again refraining from reference to state law); Stroman v. W. Coast Grocery Co., 884 F.2d 458, 461 (9th Cir. 1989) (same).

136. See, e.g., Beazer E., Inc. v. Mead Corp., 34 F.3d 206, 212 (3d Cir. 1994) ("Generally, federal law governs the validity of an agreement releasing a cause of action arising under federal law[,] . . . but the construction or interpretation of a private contract is generally thought to be a question of state law."); Botefur v. City of Eagle Point, 7 F.3d 152, 155–56 (9th Cir. 1993) (suggesting that uniform rules of federal law govern both the validity of a release of federal rights and the prerequisites for its enforcement, but adding that interpretation of the release agreement "is governed by principles of state contract law").

137. See, e.g., Street v. J.C. Bradford & Co., 886 F.2d 1472, 1481 (6th Cir. 1989) (recognizing a "federal common law of release" that "at a minimum adopts the standards of the Restatement of Contracts 2d § 173 concerning contracts between parties having a fiduciary relationship").
torneys with apparent but not actual authority. The Seventh and Eleventh Circuits typically conclude that state law governs these issues even when federal claims are being settled. But the First, Second, and Fifth Circuits have instead indicated that "where an action is based upon federal law, the authority of an attorney to settle that action is a federal question." Again, these latter circuits look to general law for the substance of the governing rules; rather than simply applying local statutes or case law about the circumstances in which agreements made by agents are binding upon principals, they consult such sources as the Restatement (Second) of Agency.

2. Assignment Agreements. — Similar questions surround the assignment of federal causes of action. Congress plainly has considerable power to regulate the transfer of causes of action that it creates (or that courts recognize in enclaves of federal common law that lie within Congress's legislative power). But apart from forbidding the assignment of most claims against the federal government, Congress rarely makes explicit use of this authority. At least on its face, the typical federal statute that creates a cause of action does not address assignment one way or the other.

In light of this silence, a few old decisions concluded that federal law has nothing to say about the assignability of federal causes of action. On this view, federal law should not ordinarily be understood either to foreclose the possibility of assignment (as it would if Congress specified that federal causes of action are nontransferable) or to preempt state laws that themselves foreclose that possibility (as it would if Congress specified that federal causes of action may be assigned). Instead, once courts have identified the nature of a federal cause of action, state law applies of its own force to determine whether claims of that sort are assignable and whether a valid assignment has occurred.

Most courts, however, agree that "it would be intolerable to permit the states to determine the transferability, and thus the value, of interests..."
created by federal law." \(^{143}\) The assignability of federal causes of action is widely understood to be a matter of federal law. \(^{144}\) In the absence of contrary instructions from Congress, moreover, courts typically draw the content of the federal rule from principles of general jurisprudence. \(^{145}\)

Despite the consensus on these points, disputes remain over the questions that come next. Once courts conclude that a federal cause of action is assignable, they must decide whether it has in fact been assigned in any particular case. The majority rule is that local law governs these questions of contract law even when a federal cause of action is at issue. \(^{146}\) But a few courts have been more aggressive in understanding fed-

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144. E.g., In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig., 636 F. Supp. 1138, 1152 (C.D. Cal. 1986) ("Where a claim for relief is created by a federal statute, federal law governs the assignability of the claim."); see also Bluebird Partners, L.P. v. First Fid. Bank, N.A. N.J., 85 F.3d 970, 973 (2d Cir. 1996) ("The federal courts have consistently determined that federal law governs the assignability of claims under the federal securities laws."); In re Fine Paper Litig., 632 F.2d 1081, 1090 (3d Cir. 1980) ("[T]he status of assignments under the Sherman and Clayton Acts is a matter of federal law, and, in this connection, a number of cases have assumed that such assignments are valid.").

145. See, e.g., Casino Cruises Inv. Co. v. Ravens Mfg. Co., 60 F. Supp. 2d 1285, 1287-88 (M.D. Fla. 1999) (relying upon the rule applicable "in virtually all [states]" to conclude that "personal injury claims are not assignable in admiralty cases"). Identifying the relevant principles of general law can be tricky, because many American jurisdictions have relaxed traditional restrictions on assignment. Compare Va. Code Ann. § 8.01-26 (2000) (retaining the traditional rule that only "causes of action for damage to real or personal property . . . and causes of action ex contractu" may be assigned), with N.Y. Gen. Oblig. Law § 13-101 (McKinney 2001) (permitting assignment of most tort claims other than those "to recover damages for a personal injury"). To the extent that the background principles of general law have changed over time, claims under old federal statutes might be less assignable than claims under newer statutes. Compare Carter v. Romines, 560 F.2d 395, 396 & n.1 (8th Cir. 1977) (per curiam) (asserting that monetary claims under 42 U.S.C. § 1983 "may not be bought and sold in the market place" even if state law would otherwise permit such transfers), with APCC Servs., Inc. v. AT&T Corp., 281 F. Supp. 2d 41, 45-51 (D.D.C. 2003) (concluding that federal law permits assignment of monetary claims under the Telecommunications Act notwithstanding Virginia's local restrictions on assignment), rev'd on other grounds sub nom. APCC Servs., Inc. v. Sprint Commc'ns Co., 418 F.3d 1298 (D.C. Cir. 2005) (per curiam); cf. infra note 216 (flagging interpretive questions about whether the general law incorporated into old federal statutes should be understood to be static or dynamic).

146. See, e.g., Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 17-18 (2d Cir. 1997) (invoking state-law precedents to determine that the agreements in question "were insufficient to transfer . . . ownership of the claims of the selling shareholders"); Fischer Bros. Aviation, Inc. v. NWA, Inc., 117 F.R.D. 144, 146-47 (D. Minn. 1987) (observing that federal law makes antitrust claims assignable "assuming a valid assignment," but using state law to decide whether a particular assignment agreement fails for want of consideration). Judges may disagree about whether local law applies of its own force or by incorporation into federal law. Compare Lowry, 707 F.2d at 740 (Gibbons, J., dissenting) ("There is certainly no clear consensus that federal law decides the fact of assignment of interests created by federal law. Indeed the general rule has long been assumed to be otherwise.").
eral law to establish some nationwide rules about what counts as a valid assignment. In a sign of the haphazard nature of the courts’ approach to these kinds of questions, the circuit splits about assignment agreements do not track the circuit splits about release agreements, even though releases can be thought of as assignments to the prospective defendant.

B. Federal Law and the Corporate Form

A similar fog surrounds the relationship between federal statutes and background rules of corporate law. Questions about the extent to which particular statutes respect corporate forms have triggered a host of circuit splits. Even where the circuits are fairly unified, their approach to statutes in one field can be hard to reconcile with their approach to statutes in another field.

1. CERCLA. — Few federal statutes have more practical importance than the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which imposes sweeping liability on the “owner[s]” and “operator[s]” of facilities from which hazardous substances are released. In United States v. Bestfoods, the Supreme Court read these terms against the “venerable common-law backdrop” of “respect for corporate distinctions,” including the distinction between parent corporations and their wholly owned subsidiaries. Under the Court’s interpretation of CERCLA, a parent corporation does not qualify as an “owner” or “operator” of a polluting facility simply because it owns a subsidiary that in turn owns or operates the facility. Instead, CERCLA respects the basic corporate law principle that a subsidiary’s acts should be attributed to the parent corporation “only when[] the corporate veil [separating the two entities] may be pierced.”

147. See Gulfstream III Assocs. v. Gulfstream Aerospace Corp., 995 F.2d 425, 438–40 (3d Cir. 1993) (holding that “only an express assignment of an antitrust claim can be valid”); see also Lerman v. Joyce Int’l, Inc., 10 F.3d 106, 112 (3d Cir. 1993) (assuming that Gulfstream’s conclusion extends to RICO claims, though appearing to relax what Gulfstream meant by an “express” assignment); cf. Bluebird Partners, 85 F.3d at 973 n.6, 974 (holding that federal securities claims are not governed by a state statute providing that the sale of a security transfers causes of action related to the security unless the seller expressly retains them).

148. See Martin, 665 F.2d at 605 (acknowledging “hidden tension” between the Fifth Circuit’s precedents about release of federal causes of action and its precedents about assignment of federal causes of action).


151. Id. at 61–66.

152. Id. at 63.
(rather than on behalf of the subsidiary), then the parent will be deemed an “owner” or “operator” of the facility only if the conditions necessary for veil piercing are satisfied.

Circuit courts, however, have disagreed about how to identify what those conditions are. The Sixth Circuit has understood CERCLA to incorporate varying rules of state law about the circumstances in which the acts and liabilities of one corporation should be imputed to an ostensibly separate entity. The Third Circuit, by contrast, favors developing a nationally uniform set of veil-piercing rules that are tailored specifically to CERCLA and that give less respect to the corporate form than ordinary veil-piercing doctrine. In Bestfoods, the Supreme Court acknowledged the circuits’ “significant disagreement” on this important question, but expressly declined to weigh in. The Second Circuit has nonetheless taken Bestfoods to cut against both the Third Circuit’s approach and the Sixth Circuit’s approach. Rather than reading CERCLA either to authorize the development of “CERCLA-specific” veil-piercing rules or to incorporate varying rules of local law, the Second Circuit understands the statute to incorporate “general common law principles of corporate law”—nationally uniform principles that reflect doctrines “widely adopted among the states,” but that do not necessarily mirror the corporate law of any single state.

Questions of successor liability under CERCLA have generated the same three-way split. Suppose that a company buys the assets of a busi-

153. See United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 580 (6th Cir. 1997), vacated on other grounds sub nom. Bestfoods, 524 U.S. 51. The Sixth Circuit has indicated that the relevant state is the one in which the parent and subsidiary are incorporated rather than the one in which the CERCLA facility is located. See City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 250 (6th Cir. 1994); Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1248–49 (6th Cir. 1991) (Kennedy, J., concurring). The Sixth Circuit has not yet had to decide what to do when the parent and its subsidiary are incorporated in different states. Cf. AT&T Global Info. Solutions Co. v. Union Tank Car Co., 29 F. Supp. 2d 857, 865–66 (S.D. Ohio 1998) (confronting this situation).

Jurisprudence on these questions is less developed in the Eleventh Circuit, but that court too apparently reads CERCLA to necessitate reference to the veil-piercing rules of a particular state. See Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1498–99 (11th Cir. 1996) (using state partnership law to determine whether limited partners should be considered “owners” of a CERCLA facility to which the partnership held title).

154. See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1999) (interpreting the scope of “operator” liability in light of “CERCLA’s broad remedial purposes” and finding it “clear” that “Congress has expanded the circumstances under which a corporation may be held liable for the acts of an affiliated corporation”); id. at 1225 (supporting the development of uniform federal veil-piercing rules for “owner” liability too).


157. Indeed, the Second Circuit’s comments about Bestfoods came in the context of a case about successor liability. See id. at 685 (reading Bestfoods, which involved a parent corporation’s liability for acts of its subsidiary, to speak to the more general question of “whether liability under CERCLA passes from one corporation to another”).
ness that once owned or operated a CERCLA facility. Under what circumstances should the buyer be held to have acquired CERCLA liability too? The Sixth Circuit, this time joined by the First, again answers this question according to the corporate law of the relevant state.\textsuperscript{158} Several other circuits, however, read CERCLA to incorporate “general” law on this point; they determine successor liability under CERCLA according to “[t]he general doctrine of successor liability in operation in most states . . . rather than the excessively narrow statutes which might apply in only a few states.”\textsuperscript{159} The Fourth Circuit, for its part, has tried to promote Congress’s alleged purposes by developing special federal rules of successor liability that assign CERCLA liabilities more readily than would the law of most states.\textsuperscript{160} Under either of the latter approaches, federal law might make an acquiring company liable for the seller’s CERCLA liabilities even if local state law does not make the acquiring company responsible for any of the seller’s other liabilities.

2. Federal Labor and Employment Statutes. — The interaction of federal labor and employment statutes with state corporate law has generated a similar welter of decisions. Some of the relevant federal statutes (or administrative regulations promulgated under their authority) expressly override corporate formalities in certain limited respects.\textsuperscript{161} Even in the absence of express provisions, courts have happily drawn fine distinctions about the purposes for which these statutes do and do not rely upon state corporate law.\textsuperscript{162} The case law is therefore dizzyingly complex. For illustrative purposes, though, we can content ourselves with a quick survey of issues raised by one of the less complicated statutes in this area, Title VII of the Civil Rights Act of 1964.

\textsuperscript{158} See City Mgmt. Corp., 43 F.3d at 250; see also United States v. Davis, 261 F.3d 1, 52-54 (1st Cir. 2001).

\textsuperscript{159} Smith Land \& Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988); accord United States v. Gen. Battery Corp., 423 F.3d 294, 304 (3d Cir. 2005); La.-Pac. Corp. v. Asarco, Inc., 909 F.2d 1260, 1262-63 (9th Cir. 1990). Inspired by its understanding of \textit{Bestfoods}, the Second Circuit is a recent convert to this view. See Nat'l Servs. Indus., 352 F.3d at 685-87. The Ninth Circuit, on the other hand, has shown signs of moving away from this view and reading CERCLA against the backdrop of local rather than general law. See Atchison, Topeka \& Santa Fe Ry. Co. v. Brown \& Bryant, Inc., 159 F.3d 358, 361-64 (9th Cir. 1998) (reserving judgment on whether to overrule \textit{Louisiana-Pacific}, but observing that “there has been no real explanation of the need for uniformity in the particular area of successor liability” and that successor liability under CERCLA should perhaps be determined according to state law).


\textsuperscript{161} See, e.g., \textit{29 U.S.C. § 1060(c) (2000)} (addressing ERISA plans maintained by members of a group of corporations under common control).

\textsuperscript{162} Compare \textit{Levit v. Ingersoll Rand Fin. Corp.}, 874 F.2d 1186, 1193-94 (7th Cir. 1989) (reading \textit{§ 515} of ERISA to incorporate varying rules of state law about a corporate officer’s liability for moneys owed under \textit{§ 515}), with \textit{Moriarty v. Svec}, 164 F.3d 323, 327-29 (7th Cir. 1998) (reading the same provision to support uniform rules of federal common law about a successor entity’s liability for moneys owed under \textit{§ 515}).
To begin with, an entity is not subject to Title VII's prohibitions on job discrimination unless it has at least fifteen employees. In counting noses for this purpose, courts largely follow corporate forms created by state law; if a single corporation has more than fifteen employees, Title VII will protect those employees even if they are spread across two separate divisions that are each managed autonomously. Even when two entities are separately incorporated, however, courts sometimes count their employees in the aggregate, on the theory that the two entities are part of a single integrated enterprise. Courts disagree about the test for this sort of aggregation. The Seventh Circuit understands Title VII to borrow either state or general corporate law; to determine whether the employees of two nominally distinct corporations should be counted in the aggregate, it asks whether "the traditional conditions ... for 'piercing the veil'" are present, so that "affiliates of the plaintiff's employer would be liable for the employer's debts." But the Sixth, Eighth, and Ninth Circuits instead use a four-factor test originally developed by the National Labor Relations Board (NLRB) to identify employers whose labor relations affect interstate commerce. The Third Circuit prefers to borrow "the

163. See 42 U.S.C. § 2000e(b) (2000) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ."); id. § 2000e(a) (defining "person" to include "partnerships, associations, corporations, . . . unincorporated organizations," and other entities).

164. Papa v. Katy Indus., Inc., 166 F.3d 937, 940–41 (7th Cir. 1999). The Seventh Circuit will also count employees in the aggregate if the two entities were separately incorporated simply to evade the antidiscrimination laws. See id. at 941. Likewise, when someone on the payroll of a subsidiary sues the parent corporation, the Seventh Circuit will aggregate employees if the parent ordered the discriminatory action about which the plaintiff is complaining. See id. at 941–42.

165. Federal labor law gives the NLRB jurisdiction over unfair labor practices that affect interstate commerce. See 29 U.S.C. § 160(a). Early on, the NLRB decided that it would "limit its assertion of jurisdiction to those cases which, in its opinion, have a substantial impact upon interstate commerce." 21 NLRB Ann. Rep. 7 (1956). The NLRB measured that impact by focusing on the annual revenues and expenditures of the companies that it was investigating. It made clear, however, that when it deemed two nominally separate entities to be part of a single "integrated enterprise," it would judge their revenues and expenditures in the aggregate. Id. at 14. The NLRB identified "[i]nterrelation of operations," "[c]entralized control of labor relations," "[c]ommon management," and "[c]ommon ownership or financial control" as important factors in this inquiry. Id. at 14–15; see also Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965) (per curiam) (reciting the NLRB's doctrine on this point). A number of circuits have consulted the same factors in Title VII cases to decide whether the employees of nominally distinct corporations should be aggregated. See, e.g., Kang v. U. Lim Am., Inc., 296 F.3d 810, 815 (9th Cir. 2002); Armbuster v. Quinn, 711 F.2d 1332, 1337–38 (6th Cir. 1983); Baker v. Stuart Broad. Co., 560 F.2d 389, 392 (8th Cir. 1977).
factors courts use to determine when substantively to consolidate two or more entities in the bankruptcy context.\footnote{166}

The circumstances in which affiliated corporations face derivative liability for each other's discriminatory acts are similarly murky. Everyone agrees that a parent corporation can be liable to someone who is technically on a subsidiary's payroll if the parent itself discriminates against the employee or orders the subsidiary to do so. But what if the parent had nothing to do with the subsidiary's discriminatory acts, and the employee is seeking to hold the parent liable simply because of its other ties to the subsidiary? To some extent, this question has triggered the same circuit split as the question of how to count the employees of nominally separate entities: The Seventh Circuit will determine the parent's liability by applying either general corporate law or the local law of a particular state\footnote{167} while the Sixth Circuit uses the NLRB's four-factor test.\footnote{168} But the Ninth Circuit, which borrows the NLRB's test for purposes of counting employees, switches sides on this issue; like the Seventh Circuit, it apparently uses either local or general corporate law to determine a parent corporation's liability for its subsidiary's discrimination.\footnote{169} Other circuits have explicitly ducked the question.\footnote{170}

If the rules governing affiliate liability for Title VII violations are unsettled, those governing successor liability are surprisingly clear: Courts borrow a special rule developed by the NLRB in the exercise of its remedial authority under the National Labor Relations Act.\footnote{171} But as Judge

\footnote{166. Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 84–88 (3d Cir. 2003). Those factors are themselves the subject of a circuit split. See id. at 86 n.7.}

\footnote{167. See \textit{Papa}, 166 F.3d at 941–43.}

\footnote{168. See \textit{Armbruster}, 711 F.2d at 1337. The Fifth Circuit also purports to use the NLRB's test, but it assesses each factor only to determine whether the parent corporation was itself behind the unlawful discrimination. See \textit{Lusk} v. Foxmeyer Health Corp., 129 F.3d 773, 777, 781 (5th Cir. 1997) (affirming summary judgment for a parent corporation because the evidence did not link it to the decision to terminate its subsidiary's employees). When used in this way, the test does not address questions of derivative liability at all. See \textit{Pearson} v. Component Tech. Corp., 247 F.3d 471, 486–87 (3d Cir. 2001) (properly classifying \textit{Lusk} as a case about the parent's "direct liability").}

\footnote{169. See Anderson v. Pac. Mar. Ass'n, 336 F.3d 924, 928–29 (9th Cir. 2003) (holding the NLRB's test inapplicable to this issue); Watson v. Gulf & W. Indus., 650 F.2d 990, 993 (9th Cir. 1981) (taking an approach that seems to reflect general corporate law).}

\footnote{170. Romano v. U-Haul Int'l, 233 F.3d 655, 664–65 (1st Cir. 2000); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999).}

\footnote{171. In \textit{Perma Vinyl Corp.}, 164 N.L.R.B. 968 (1967), a company was accused of violating the National Labor Relations Act by firing employees at its plant in order to discourage union membership. While this charge was pending, the company sold its business to a buyer that continued to operate the plant with the same workforce. The NLRB decided that in such cases, where the buyer had been on notice of the pending charges, the NLRB could require the buyer to "remedy[ ] his predecessor's unlawful conduct" by reinstating the wrongfully discharged workers and paying them their lost wages. Id. at 969 (reading 29 U.S.C. \textsection 160(c) to give the NLRB "broad . . . power . . . to frame such remedial orders as will effectuate the policies of the Act" (internal quotation marks omitted)). The Supreme Court later accepted the NLRB's understanding of its powers, \textit{Golden State Bottling Co. v. NLRB}, 414 U.S. 168, 176 (1973), and lower courts}
Posner has noted, the justification for this approach is "a little elusive." When considering affiliate liability, after all, few circuits have seemed eager to replace state or general corporate law with special federal rules borrowed from the NLRB. The courts' approach to successor liability for monetary remedies under Title VII is also hard to reconcile with the approach that many circuits have taken to the parallel issue under CERCLA. Even when the circuits manage to agree about successor liability, then, their agreement is not necessarily a sign of coherence.

III. "Policy Bundles" and the Domain of Federal Law

One could add many more circuit splits and intracircuit inconsistencies to this catalog, but the basic point should already be clear. Although modern-day judges often refer to general law as a coherent body of legal rules that stand available for incorporation by Congress or the courts, they have reached disparate conclusions about exactly when to find this sort of incorporation.

Most of the disagreements surveyed in Part II derive from sloppy thinking about what Frank Easterbrook calls the "domain" of federal law. The key question is straightforward: When federal law has authoritatively established certain rules of decision (such as the existence of a particular duty backed up by a private cause of action), to what extent should courts understand federal law to control other issues that arise in conjunction with those rules (such as the validity or interpretation of agreements purporting to release the cause of action that federal law has created)? If courts conclude that an issue comes within the domain of federal law, but that written federal law does not suggest any tailor-made answer, they are quite likely to draw upon general law to fill the resulting "gap." By contrast, courts that take a narrower view of the domain of federal law will resolve the issue according to local law. Bringing some structure to the courts' intuitions about the domain of federal law is therefore a critical step toward regularizing the use of general law.

Writing specifically about the issues that Congress federalizes when it enacts a statute, Judge Easterbrook proposed a simple test: "[U]nless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process." This test, however, does not readily fit aspects of our current practice that seem sensible and that most people take for granted. As we shall see, for

173. See supra notes 158-159 and accompanying text.
174. See Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 533-34 (1983) (using the concept of a statute's "domain" to refer to the set of questions that the statute either itself answers or authorizes judges applying the statute to answer).
175. Id. at 544.
instance, courts routinely assume that federal law incorporates principles of general jurisprudence to answer certain questions that Congress may well have ignored completely, but that are connected with congressionally created causes of action in such a way as to make the use of state law seem inappropriate. If Judge Easterbrook's proposed test would exclude these questions from the domain of federal law, then it is too narrow. On the other hand, if Judge Easterbrook would describe these questions as matters on which Congress has "plainly hand[ed] courts the power to create and revise a form of common law," then his proposed test is not very helpful, because it offers little guidance for distinguishing these questions from others that fall outside the federal domain.

This Part tries to develop a better answer to the important question flagged by Judge Easterbrook. General American choice-of-law jurisprudence, I argue, permits us to identify what William Allen and Erin O'Hara call "policy bundles"—clusters of issues that policymakers are presumed to treat as a package and that choice-of-law analysis therefore lumps together. In the absence of reasons to believe that Congress has a different sense of policy linkages than other American lawmakers, consensus views about those linkages can shed some light on the presumptive domain of federal statutes. In particular, when Congress has explicitly federalized one issue, the concept of policy bundles helps us identify the related questions that can plausibly be thought to have been federalized at the same time.

To be sure, because the concept of policy bundles grows out of ordinary choice-of-law analysis (which addresses the relations between governments with authority over different territories), it fails to reflect some special features of American federalism (in which the federal government shares authority over each state's territory with the government of that state). Federal law sometimes operates simply as an overlay on top of state law; within any particular policy bundle, Congress might choose to federalize only a few discrete issues and to leave state law in charge of other matters. As a result, even when two issues occupy the same pol-

176. See infra Part III.B.1.a.
178. For example, Congress sometimes provides special federal defenses to people who are sued on state causes of action, or replaces the states' otherwise applicable standards of care with special federal rules. See, e.g., 15 U.S.C. § 1681v (Supp. II 2002) (immunizing consumer reporting agencies from liability under state law for furnishing certain information to federal counterterrorism units); 19 U.S.C. § 507(b) (2000) (immunizing people "who render[,] assistance in good faith upon the request of a customs officer" from liability for civil damages "if the assisting person acts as an ordinary, reasonably prudent person would have acted under the same or similar circumstances"); Year 2000 Information and Readiness Disclosure Act, Pub. L. No. 105-271, § 4(b), 112 Stat. 2386, 2389 (1998) (codified at 15 U.S.C. § 1 note (2000)) (creating additional federal
icy bundle and Congress has addressed one of them, we cannot automatically conclude that Congress has implicitly federalized the other. But consensus views about policy bundles can at least establish outer limits on the likely domain of federal law: If we can identify a consensus that two issues occupy different policy bundles, then the mere fact that Congress has addressed one will rarely imply that federal law now governs the other too.

In conjunction with other doctrines about federal preemption of state law, the concept of policy bundles can also be a powerful affirmative tool. When courts conclude that Congress intended federal law to occupy an entire field, for instance, analysis of the relevant policy bundles can help courts determine the scope of the field that Congress has occupied. Within that field, moreover, courts need not worry about the complications that arise when the federal government shares authority with the states; to the extent that written federal law fails to suggest any resolution of certain issues in that field, courts can safely conclude that Congress has left a gap for principles of general jurisprudence to fill. As we shall see, then, the concept of policy bundles sheds new light on the contours and consequences of field preemption. It also offers some insight into the purer enclaves of federal common law that are created by the Constitution itself.

A. Using Choice-of-Law Jurisprudence to Identify Agreements About Policy Bundles

My proposed use of general American choice-of-law jurisprudence to identify consensus views about policy bundles invites a threshold objection. As one of our country's leading jurists has observed, "[W]e have in the United States an essentially chaotic system in which a multitude of different choice of law systems are employed by different states."179 If those systems are so disparate that there is simply no consensus about the limits of any policy bundle, then the plan of attack that I have outlined will not work.

This potential problem is quite recent. For much of our history, the general law of nations was understood to include choice-of-law principles that jurists around the world could use to decide which country's law governed which issues in the cases that came before them. When this analysis called for the application of some sort of local American law, and when no substantive federal law was in the picture, American courts used their understandings of the same general principles to determine which

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requirements for recovery on state-law claims involving Y2K problems). To the extent that these provisions leave the state causes of action otherwise intact, they plainly do not federalize the entire policy bundle that they address. Cf. Hart, supra note 1, at 525 (noting "the essentially incomplete and interstitial nature of federal law").

state's law applied.\textsuperscript{180} For purposes of judicial federalism, of course, the Supreme Court ultimately decided not to "enforc[e] an independent 'general law' of conflict of laws" in cases like \textit{Erie}; when litigants pursue state causes of action in federal court, district judges now determine the applicable substantive law by borrowing the choice-of-law principles used by the state in which they sit.\textsuperscript{181} Until the 1960s, though, those principles remained fairly uniform across the country: As a matter of state law, "virtually all courts followed" the rules reflected in the American Law Institute's first Restatement of Conflict of Laws,\textsuperscript{182} which in turn "represented a synthesis of a stable . . . multilateral choice-of-law system whose American roots dated at least to Justice Story's 1834 treatise, and whose European ancestry predated Story by centuries."\textsuperscript{183}

Beginning in the 1960s, the "conflicts revolution" ended this traditional consensus, and different state courts started taking discordant approaches to choice-of-law questions.\textsuperscript{184} But even today, we can identify some harmonies within those approaches. To begin with, the revolution "has been largely confined to the area of tort and contract conflicts";\textsuperscript{185} there remains widespread agreement that the law of the forum controls

\begin{footnotes}
\footnotetext{180}{See, e.g., Max Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. Chi. L. Rev. 775, 802–12 (1955).}
\footnotetext{181}{Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). As commentators have observed, this result "is not compelled by the \textit{Erie} decision." 19 Charles Alan Wright et al., Federal Practice and Procedure § 4506, at 77 (2d ed. 1996). Although the Court's opinion in \textit{Erie} discussed both the relevance of state law to Tompkins's case and the relevance of state judicial decisions to state law, it simply took for granted that the relevant state law was that of Pennsylvania, where Tompkins had been injured. Despite the fact that Tompkins had brought his suit in the Southern District of New York, the Court gave no indication that it had consulted New York choice-of-law rulings in reaching this conclusion. Id.; see also Hart, supra note 1, at 514 n.84 ("Justice Brandeis seemed to assume that a federal court should think for itself on conflicts problems."); cf. Ruhlin v. N.Y. Life Ins. Co., 304 U.S. 202, 208 n.2 (1938) (declining to resolve this issue, but treating it as an open question after \textit{Erie}). Until 1941, some lower federal courts therefore continued to decide choice-of-law questions in cases like \textit{Erie} by invoking the Restatement of Conflict of Laws rather than by investigating the choice-of-law rulings of any particular state. See, e.g., Gray v. Blight, 112 F.2d 696, 697–98 (10th Cir. 1940); Hunter v. Derby Foods, Inc., 110 F.2d 970, 971–72 (2d Cir. 1940). But see Waggaman v. Gen. Fin. Co. of Phila., Pa., 116 F.2d 254, 257 (3d Cir. 1940) (anticipating \textit{Klaxon}); Sampson v. Channell, 110 F.2d 754, 759–62 (1st Cir. 1940) (same); Herbert F. Goodrich, Handbook on the Conflict of Laws 24 (2d ed. 1938) (same).}
\footnotetext{182}{Michael H. Gottesman, Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 Geo. L.J. 1, 3 (1991).}
\end{footnotes}
matters of judicial procedure,\textsuperscript{186} that the law of the state of incorporation governs questions about a corporation's internal affairs,\textsuperscript{187} that various questions about real property are controlled by the law of the state in which the property is located,\textsuperscript{188} and so forth.\textsuperscript{189} Even in tort and contract cases, moreover, most states that have rejected the traditional approach have now coalesced around the Restatement (Second) of Conflict of Laws.\textsuperscript{190} In keeping with this situation, federal tribunals that have nationwide territorial jurisdiction, and that might therefore be expected to apply "general" choice-of-law rules rather than following the approach of any individual state, tend to use the Restatement (Second) to handle the choice-of-law questions that come before them.\textsuperscript{191} When state law bears on federal causes of action, many federal circuit courts similarly treat the Restatement (Second) as an appropriate source of national rules about which state's law to apply.\textsuperscript{192}

\textsuperscript{186} See, e.g., John T. Cross, The Conduct-Regulating Exception in Modern United States Choice-of-Law, 36 Creighton L. Rev. 425, 473 n.172 (2003); see also Luther L. McDougal, III et al., American Conflicts Law 406 (5th ed. 2001) (observing that while "the distinction between substance and procedure" generates disagreements at the margins, "[m]any issues exist that are properly governed by forum law under any method of drawing the distinction").


\textsuperscript{188} See O'Hara & Ribstein, supra note 177, at 1219.

\textsuperscript{189} See, e.g., McDougal et al., supra note 186, at 652–53 (discussing general rules governing choice-of-law issues applicable to the validity of wills).

\textsuperscript{190} See Scoles et al., supra note 184, at 84–105.

\textsuperscript{191} On occasion, for instance, federal administrative agencies based in Washington, D.C., must adjudicate disputes in which state law bears on certain issues. Several such agencies have explicitly declined to use the choice-of-law rules of any particular state to decide which state's substantive law to apply, and instead have used the Restatement (Second). See A. Sam & Sons Produce Co., 50 Agric. Dec. 1044, 1059–61 (1991) (observing that "this administrative forum is forced by the statutory structure of the process for enforcing its orders to adopt its own choice of law rules," and invoking the Restatement (Second) to help decide whether New York or D.C. law governed issues in a reparation proceeding under the Perishable Agricultural Commodities Act); In re Certain Coamoxiclav Prods., USITC Inv. No. 337-TA-479, 2003 WL 1793272 (U.S. Int'l Trade Comm'n Mar. 6, 2003) (using Restatement (Second) to determine that Tennessee law governed the existence of protected trade secrets in a dispute between private companies). The United States Court of International Trade, a federal trial court with nationwide jurisdiction, seems inclined to follow suit on the rare occasions when state law is relevant to its proceedings. See Nat'l Bonded Warehouse Ass'n v. United States, 718 F. Supp. 967, 970 (Ct. Int'l Trade 1989) (using Restatement (Second) to determine which jurisdiction's code of professional responsibility to apply on a motion to disqualify counsel).

\textsuperscript{192} See, e.g., Med. Mut. of Ohio v. deSoto, 245 F.3d 561, 570 (6th Cir. 2001) ("In determining which states' law applies [on certain ERISA action issues], our analysis is governed by the choice of law principles derived from federal common law. . . . 'In the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflicts of Law' . . ." (quoting Bickel v. Korean Air Lines Co., 83 F.3d 127, 130 (6th Cir. 1996))); Edelman v. Chase Manhattan Bank, 861 F.2d 1291, 1294 n.14 (1st Cir. 1988) (indicating that in connection with federal causes of action, "choice of law questions are appropriately resolved as matters of federal common law" rather than according to the choice-of-law rules of the forum state); see also In re Vortex
Admittedly, the Restatement (Second) is harder to classify as a statement of general law than some of the American Law Institute’s other products. The indeterminacy of its approach can produce inconsistent applications even in the states that “purport to follow it,”\footnote{Borchers, Courts, supra note 183, at 1233 (concluding that “citation to the Second Restatement is often little more than a veil hiding judicial intuition,” especially when the sections being cited are general provisions listing many factors to consider rather than more specific provisions suggesting how those factors apply to particular situations).} and some states have rejected it entirely. Although most states do follow either the first or the second Restatement,\footnote{See Scoles et al., supra note 184, at 79–105 (classifying each of the fifty states).} choice-of-law jurisprudence is certainly less harmonious than it once was. But we do not need comprehensive agreement on a single choice-of-law system in order to identify some shared presumptions about “policy bundles”—issues that nearly all American jurisdictions effectively treat as a package for choice-of-law purposes, even if they then select the applicable law in different ways. As we shall see below, American choice-of-law regimes remain sufficiently harmonious to let us identify some such shared presumptions.

Of course, using American choice-of-law jurisprudence to identify consensus views about policy bundles can be tricky. Even if everyone agrees that two issues should usually be governed by the same jurisdiction’s law, this agreement will not always rest on the premise that policymakers ordinarily treat the two issues as a package. Take, for instance, the widespread rule that the fiduciary duties of corporate officers and directors are governed by the law of the same jurisdiction under which the corporation was created. According to the Supreme Court, the primary reason for this rule is not “the perceived interest of the State of incorporation,” but simply “the need for a uniform and certain standard to govern the internal affairs of a corporation”\footnote{Shaffer v. Heitner, 433 U.S. 186, 215 n.44 (1977).},\footnote{Atherton v. FDIC, 519 U.S. 213, 224 (1997).} rather than reflecting any judgment about policy linkages, this aspect of general American choice-of-law jurisprudence “seeks only to avoid conflict by requiring that there be a single point of legal reference.”\footnote{Fishing Sys., Inc., 277 F.3d 1057, 1069 (9th Cir. 2002) (“In a bankruptcy case, the court must apply federal choice of law rules. Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws.” (citation omitted)); Chuidian v. Philippine Nat’l Bank, 976 F.2d 561, 564 (9th Cir. 1992) (using identical reasoning for choice-of-law determinations in a suit brought against a foreign country pursuant to the Foreign Sovereign Immunities Act). But see In re Gaston & Snow, 243 F.3d 599, 605–06 (2d Cir. 2001) (indicating that federal district courts hearing bankruptcy cases should generally apply the choice-of-law rules of the state in which they sit); A.I. Trade Fin., Inc. v. Petra Intl Banking Corp., 62 F.3d 1454, 1463–65 (D.C. Cir. 1995) (disagreeing with Edelmann).} If that is right, then questions about the fiduciary duties of officers and directors do not occupy the same policy bundle as questions about corporate chartering, even though they typically trigger the same state’s law.\footnote{At the risk of skipping ahead in our analysis, it follows that when Congress charters a federal corporation, Congress is not tacitly federalizing questions about the}}
But even if it can be hard to conclude definitively that two issues occupy the same policy bundle, it is relatively easy to identify issues that are not in the same policy bundle. When different American courts (including those that follow the traditional approach of the original Restatement of Conflict of Laws, those that use the Restatement (Second), and those that take some hybrid approach) all agree that two issues trigger different sorts of choice-of-law analyses, so that they will routinely be governed by the laws of different jurisdictions, we can safely infer a consensus that American policymakers treat the two issues independently. Otherwise, there would not be such widespread agreement that choice-of-law analysis can sensibly separate them. As we shall see, moreover, consensus views of this sort can help us identify outer limits on the range of issues that Congress might plausibly be thought to have federalized when it established a particular rule of decision.

B. Using Policy Bundles to Identify the Reach of Federal Causes of Action

The easiest way to see both the existence and the resolving power of these consensus views is to return to the circuit splits surveyed in Part II. In one way or another, each of those splits concerns the extent to which federal law radiates outward from a federal cause of action. By analyzing the choice-of-law jurisprudence relevant to causes of action and using that jurisprudence to identify some consensus views about policy bundles, we can identify important patterns in the case law, and we can use those patterns to resolve the splits that have arisen.

Part III.B.1 begins this project by examining a host of issues that are not the subject of circuit splits. As we shall see, the case law is remarkably uniform about the proper treatment of issues that occupy the same policy bundle as a federal cause of action. With near unanimity, courts presume that all such issues come within the domain of federal law, and they use principles of general jurisprudence to fill the gaps that written federal law has left.

Part III.B.2 takes up the issues that have generated more confusion—issues that occupy different policy bundles than the federal causes of action to which they relate. While some courts have refused to extend federal law to these issues, others have seen no reason for this resistance. I hope to establish that the concept of policy bundles provides such a reason.

fiduciary duties of the corporation’s officers and directors. In the absence of specific provisions on this point, federal law might do no more than identify a particular jurisdiction (such as the state in which the federally chartered corporation is headquartered) whose corporate law will govern those questions. That is precisely what the Supreme Court concluded in Atherton. See id. (taking general choice-of-law jurisprudence to suggest only that the fiduciary duties of directors and officers of federally chartered savings and loan associations should be governed by a “single source of law” and not “that the single source of law must be federal”).
   a. The Basic Pattern. — Despite the variety of choice-of-law rules used in different American jurisdictions, those rules all tend to treat as a package certain issues that accompany the creation of a cause of action. Under virtually all American choice-of-law regimes, for instance, the same state’s law that governs whether a cause of action exists (and what its elements are) will also govern the measure of damages, \(^{198}\) the existence of substantive defenses, \(^{199}\) whether the cause of action can be assigned, \(^{200}\) and whether it survives the death of the original obligor or obligee. \(^{201}\) This consensus, moreover, reflects a shared sense of policy linkages rather than a simple need for coordination; the rules that govern these issues are commonly thought to contribute to the very definition of a cause of action and to be part and parcel of the rights that the cause of action confers. \(^{202}\) Thus, these issues are widely understood to be part of a single policy bundle.

   Correspondingly, courts presume that when Congress creates a federal cause of action to enforce a federal duty, all of these issues come within the domain of federal law. \(^{203}\) To be sure, Congress’s decision to

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198. See McDougal et al., supra note 186, at 423 (explaining that “[t]he size of a right is a part of the right” and that courts therefore “should determine the amount of an award by the rules of law that govern the substantive right”); Anthony J. Bellia Jr., Federal Regulation of State Court Procedures, 110 Yale L.J. 947, 984 (2001) (“As a matter of conflicts law, the measure of damages . . . is governed by the law under which the right of action arose . . . .”).

199. See, e.g., Diane J. Klein, The Disappointed Heir’s Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits, 55 Baylor L. Rev. 79, 108 (2003) (observing that despite the tendency of modern choice-of-law regimes to encourage départage, or issue-splitting, “it would be a strange . . . application of départage to base plaintiffs’ right to recover on [one state’s] law while providing the defendant with a defense available under [another state’s] law”).

200. See, e.g., Johnson v. Carolina Cas. Ins. Co., No. Civ. A. 98-101-GMS, 1999 WL 33220032, at *42 (D. Del. Nov. 10, 1999) (“[T]he assignability of a claim is determined by the law of the state which governs that claim.”); Conopco, Inc. v. McCreadie, 826 F. Supp. 855, 864-66 (D.N.J. 1993) (“Parties cannot create rights of assignability beyond those permitted by the law of the state in which the cause of action arose simply by entering into a contract of assignment in a [different] state . . . .”), aff’d, 40 F.3d 1239 (3d Cir. 1994); see also McDougal et al., supra note 186, at 627 (observing that whether a particular chose in action is assignable “is most readily classifiable as a property problem, referable to the law under which the chose in action came into existence”).


202. See, e.g., Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916) (“[T]he question of the proper measure of damages is inseparably connected with the right of action . . . .”).

203. The Supreme Court treats as self-evident that “[t]he elements of, and the defenses to, a federal cause of action are defined by federal law.” Howlett v. Rose, 496 U.S. 356, 375 (1990). Likewise, “[t]he Supreme Court has repeatedly held that the survivorship of a federal claim is itself an issue of federal law.” Malli’ck v. IBEW, 814 F.2d 674, 676 (D.C. Cir. 1987). Courts have reached the same conclusion about assignability, see cases cited
create a federal cause of action rarely triggers field preemption in the ordinary sense; states remain free to create parallel causes of action of their own in the same field. But states are not free to define the cause of action that Congress has created. That very limited field, consisting of issues in the same policy bundle as the federal cause of action itself, is instead the sole province of federal law.

When Congress creates a federal cause of action, it naturally establishes statute-specific rules on at least some of these issues—sometimes expressly, sometimes simply by implication. Quite commonly, however, it provides no hints at all about other issues in the same policy bundle as the cause of action. Those issues are still presumed to come within the domain of federal law. But they lend themselves to generic treatment, and so courts routinely draw the content of the applicable federal rules from general American jurisprudence.

Consider, for instance, how courts decide whether a federal cause of action survives the death of the original obligor or obligee. In a seminal case from 1942, the Fourth Circuit made clear that *Erie* "has no bearing on" the survival of causes of action created by federal statutes; rather than being governed by the local law of any individual state, this issue concerns "the interpretation of a federal statute and the consequences which flow from it." Lacking guidance from written federal law, the court used multijurisdictional treatises and individual state-court decisions to identify "[t]he modern rule as to survivability," and then read this rule into the federal antitrust statutes. Other courts did the same; faced with various federal statutes that created causes of action without addressing survivability, courts were "explicit and consistent" in understanding fed-

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supra note 144, and the measure of damages, see Baumel v. Rosen, 412 F.2d 571, 575 (4th Cir. 1969).

204. See, e.g., California v. ARC Am. Corp., 490 U.S. 93, 105 (1989) ("Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law . . . .").

205. See, e.g., Daniel J. Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 Va. J. Int'l L. 513, 536 (2002) ("[I]n general, the question of how to fill in the gaps of a federal right of action is governed by federal rather than state law."); Philip J. Weiser, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1727 (2001) (noting widespread agreement that when Congress creates a federal right of action, federal law presumptively controls various questions about the available remedies). This aspect of current doctrine makes sense. Unlike provisions creating federal defenses to state causes of action, see supra note 178, provisions creating federal causes of action are not premised on the idea that state law will continue to operate within the policy bundle that they address. In addition, the issues that these provisions almost always treat explicitly (such as the basic elements of the cause of action) tend to be more fundamental than, and logically prior to, other issues in the same policy bundle. Congress's failure to say anything about those latter issues therefore does not strongly suggest a deliberate decision to leave them outside the domain of federal law.

206. Barnes Coal Corp. v. Retail Coal Merchs. Ass'n, 128 F.2d 645, 648 (4th Cir. 1942).

207. Id. at 649 (invoking *Corpus Juris Secundum* and *American Jurisprudence*).
eral law to incorporate "common law conceptions as evolved in English and American decisions." 208

Indeed, the main point of uncertainty was not about whether federal law incorporates general jurisprudence in this way, but simply about what sort of general jurisprudence it incorporates: Do the general rules that form the backdrop for federal legislation include widespread themes in the survival statutes that all states have enacted, or do they simply reflect modern views of how the common law would stand in the absence of these statutory modifications? Even that potential uncertainty now appears to have been resolved in favor of recognizing the liberalizing trend of state statutes. 209 Subject to modest limitations that themselves have

208. Pierce v. Allen B. Du Mont Labs., Inc., 297 F.2d 323, 324 (3d Cir. 1961) (invoking both pre- and post-Erie cases); see also W. Auto Supply Co. v. Gamble-Skogmo, Inc., 348 F.2d 736, 740 (8th Cir. 1965) (noting that "the weight of federal authority" recognizes the relevance of "general common law" on this point).

Federal civil rights actions covered by 42 U.S.C. § 1988 are exceptions to this principle. As interpreted by the Supreme Court, § 1988 directs federal judges to borrow the local law of individual states to answer certain questions that occupy the same policy bundles as the federal causes of action. See 42 U.S.C. § 1988(a) (2000) (providing that in actions under certain civil rights statutes, when federal laws "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies," district courts should draw upon "the common law, as modified and changed by the constitution and statutes of the State wherein the court... is held, so far as the same is not inconsistent with the Constitution and laws of the United States"); Robertson v. Wegmann, 436 U.S. 584, 588–95 (1978) (reading § 1988 to make federal courts borrow state law to determine the survivability of actions under § 1983).

Even in civil rights actions, though, the Supreme Court does not treat § 1988 as a comprehensive direction to apply varying rules of state law to all questions that written federal law does not resolve. While the Court has read § 1988 to give this direction with respect to survivability, the Court uses rules of general law to fill many other gaps. See, e.g., Smith v. Wade, 461 U.S. 90, 34 n.2, 45–46 (1983) (understanding § 1983 to incorporate various aspects of "general tort law," including views about punitive damages allegedly shared by "[t]he large majority of state and lower federal courts"); Imbler v. Pachman, 424 U.S. 409, 418 (1976) (reading § 1983 to incorporate "general principles of tort immunities and defenses"); Pierce v. Gilchrist, 359 F.3d 1279, 1286–88 (10th Cir. 2004) (using "general principles of common law among the several states," rather than "the specific terms of the tort law of any particular state," as the starting point for determining the contours of a § 1983 claim for malicious prosecution); see also Seth F. Kreimer, The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. Pa. L. Rev. 601, 620, 628 (1985) (arguing that the original meaning of § 1988 "instructs federal courts to apply the general common law, as modified by local statutes," though assuming that "[f]ederal courts have gone out of th[is] business" after Erie).

209. See Cox v. Roth, 348 U.S. 207, 210 (1955) (referring favorably to Roscoe Pound's view that common themes in state statutes permitting tort claims to survive the tortfeasor's death should be seen "as part of the general law"); cf. Jaffee v. Redmond, 518 U.S. 1, 12–13 (1996) (using "the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege" to support recognizing such a privilege as a matter of federal common law pursuant to Federal Rule of Evidence 501, and deeming it "of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision").
support in general law, federal causes of action are usually understood to survive the death of both the original plaintiff and the original defendant, precisely because general American jurisprudence now favors this result.

Cases considering whether to award prejudgment interest on federal causes of action have followed a similar trajectory. General American choice-of-law rules treat the availability of prejudgment interest as part of the measure of damages and hence put it into the same policy bundle as the underlying cause of action. Accordingly, courts agree that when a federal statute creates a cause of action, "whether [prejudgment] interest is to be allowed . . . is a question of federal law." Because federal statutes rarely address this topic explicitly, however, courts have drawn the substance of the applicable rules from general law.

Again, changes in the relevant patterns of general law have made this point especially clear, because they have produced corresponding changes in the default federal rule. Until the early twentieth century, general American jurisprudence permitted prejudgment interest to accrue only on liquidated claims; plaintiffs suing for a sum certain could recover prejudgment interest, but plaintiffs advancing unliquidated claims for personal injury could not. Courts understood federal statutes of the day to incorporate this background principle of general law.

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210. Many courts have held that federal causes of action survive the plaintiff's death only to the extent that they are "remedial" rather than "penal." See Faircloth v. Finesod, 938 F.2d 513, 518 (4th Cir. 1991); Smith v. Dep't of Human Servs., 876 F.2d 832, 834-36 (10th Cir. 1989); James v. Home Constr. Co. of Mobile, 621 F.2d 727, 729-30 (5th Cir. 1980); Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407, 414 (7th Cir. 1980), overruled on other grounds by Pridgeon v. Gates Credit Union, 683 F.2d 182 (7th Cir. 1982). Courts that have endorsed this rule link it to "general principles of common law," Murphy v. Household Fin. Corp., 560 F.2d 206, 208 (6th Cir. 1977), and a number of state survival statutes also reflect it, see, e.g., Colo. Rev. Stat. Ann. § 13-20-101(1) (West 2005); Conn. Gen. Stat. Ann. § 52-599(c)(3) (West 2005); Del. Code Ann. tit. 10, § 3701 (1999); N.H. Rev. Stat. Ann. § 556:15 (LexisNexis 1997); see also Schreiber v. Sharpless, 110 U.S. 76, 80 (1884) (applying the parallel rule that causes of action for a penalty or forfeiture do not survive the defendant's death); Restatement (Second) of Torts § 908 cmt. a (1979) ("Punitive damages are not awarded against the representatives of a deceased tortfeasor nor, ordinarily, in an action under a death statute.").

211. See, e.g., Fed. Sav. & Loan Ins. Corp. v. Fielding, 316 F. Supp. 82, 85 (D. Nev. 1970) ("The presumption in many states is that every cause survives until the contrary is made to appear by way of exception to the rule. . . . Whether or not the law of one state, Nevada, allows survival is only one factor to be considered in determining what the federal rule is." (citation omitted)); cf. Mallick v. IBEW, 814 F.2d 674, 677 (D.C. Cir. 1987) (favoring the survival of a federal cause of action, but purporting to derive this conclusion from the purposes behind the specific federal statute in question).

212. See Restatement (Second) of Conflict of Laws § 171 cmt. c (1971); Restatement of Conflict of Laws §§ 418 cmt. c, 419 cmt. a (1934).

213. See supra note 198 and accompanying text. By contrast, postjudgment interest typically depends on the law of the jurisdiction that rendered the judgment.


As the twentieth century wore on, however, the distinction between liquidated and unliquidated claims "lost its hold on the legal imagination," and many jurisdictions made prejudgment interest more widely available. In keeping with this "evolving consensus," courts understand newer federal statutes to make prejudgment interest available even for many unliquidated claims.

General law is equally central to a host of other questions about the measure of damages for federal causes of action. The Supreme Court has made this principle explicit in FELA cases, where judges have long been obliged to determine the measure of damages "according to general principles of law as administered in the Federal courts." But the same goes for causes of action under most federal statutes that do not suggest other rules. Although the Court has yet to articulate the theme that guides these cases, the basic rule is simple: Absent contrary guidance from Congress, statutes creating federal causes of action to enforce federal duties are typically understood not only to federalize questions about the proper measure of damages, but also to draw the substance of the federal rules from principles of general law.

216. See, e.g., Murmann v. N.Y., New Haven & Hartford R.R. Co., 180 N.E. 114, 114-15 (N.Y. 1932) (construing the FELA). In Monessen Southwestern Railway Co. v. Morgan, 486 U.S. 330, 336-39 (1988), the Supreme Court held that even modern-day plaintiffs cannot recover prejudgment interest in FELA suits for personal injuries, because the FELA implicitly incorporated the general rules about prejudgment interest that prevailed when it was enacted in 1908. This conclusion, however, is not inevitable. Instead of reading federal statutes to incorporate principles of general jurisprudence as they stood at the moment of enactment, courts could read them to incorporate something akin to a choice-of-law rule, which directs courts to apply rules of general law as they continue to evolve. See Smith v. Wade, 461 U.S. 30, 34 n.2 (1983). The choice between these two interpretive possibilities is a recurring question that courts should confront whenever they use rules of general law to fill the interstices of a federal statute.


218. Id.

219. According to the Seventh Circuit, indeed, "[t]he time has come . . . to announce a rule that prejudgment interest should be presumptively available to victims of federal law violations." Gorenstein Enters. v. Quality Care-USA, Inc., 874 F.2d 431, 436 (7th Cir. 1989); cf. City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 194-97 (1995) (concluding, on the basis of "admiralty's traditional hospitality to prejudgment interest" and the widespread criticism of "the liquidated/unliquidated distinction" in other fields, that courts should apply a presumption in favor of awarding prejudgment interest in maritime collision cases).

220. Monessen, 486 U.S. at 335 (internal quotation marks omitted) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916)).

221. See, e.g., Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co., 259 F.3d 1036, 1046-47 (9th Cir. 2001) (invoking the Restatement (Third) of Trusts to identify the measure of damages in an ERISA action); Hector Martinez & Co. v. S. Pac. Transp. Co., 606 F.2d 106, 108 n.1 (5th Cir. 1979) (noting that federal law "adopts common law principles" to supply the measure of damages for suits under the Carmack Amendment).

222. See, e.g., 28 U.S.C. § 2674 (2000) (adopting state law measures of damages in suits under the Federal Tort Claims Act, which also uses state law to determine the parties' substantive rights and duties).
The Court has made similar use of general law to decide when plaintiffs asserting federal causes of action can recover punitive damages. Consider, for instance, the various federal statutes that prohibit race, sex, and disability discrimination in programs that receive federal funding. Because the antidiscrimination obligation imposed by those statutes is a condition on the grant of federal funds, the Court has analogized it to a condition imposed by a contract. To determine the remedies available to private plaintiffs, the Court has therefore consulted the Restatement (Second) of Contracts; in keeping with general contract law, the Court understands these federal statutes to let plaintiffs win compensatory damages and injunctive relief, but not punitive damages. In much the same way, the Court has read the Civil Rights Act of 1991, which makes punitive damages available in Title VII actions, to incorporate ideas from the Restatement (Second) of Agency about the extent of vicarious liability for such damages.

b. An Instructive Exception. — Of all the issues that occupy the same policy bundle as federal causes of action, there is only one that courts typically handle by absorbing rules of local rather than general law. Even that exception, which concerns limitations periods, does not really contradict the broader pattern. If anything, its historical development actually confirms the relevance of policy bundles to the domain of federal causes of action.

The status of limitations periods in American choice-of-law jurisprudence has changed over time. In the eighteenth and nineteenth centuries, state courts routinely used their own state’s statutes of limitation even for claims that had arisen under the substantive law of a different state. Thus, limitations periods were generally understood to occupy a different policy bundle than the causes of action to which they applied. Correspondingly, when Congress created a federal cause of action without engrafting a particular limitations period upon it, the domain of the federal statute was not thought to include questions about the length of the relevant limitations period. Both state and federal courts instead applied the local law of the state in which they sat.

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226. See Sun Oil Co. v. Wortman, 486 U.S. 717, 724–26 (1988) (citing early nineteenth-century cases). The state whose law gave rise to a cause of action could avoid this rule by engrafting a special limitations period onto the cause of action in such a way that it was part of the definition of the underlying right. See Davis v. Mills, 194 U.S. 451, 454 (1904).
Justice Scalia has famously argued that this should still be true today; on the increasingly rare occasions when written federal law does not specify a limitations period for a federal cause of action, he believes that the Rules of Decision Act requires federal courts to apply state law. In modern times, however, general American jurisprudence has come to take a different view of the relevant policy bundles. The law of the forum remains relevant to limitations defenses; many state courts will not entertain a claim, wherever it arose, if it is untimely under their own state’s statute of limitations. But because of the “borrowing statutes” that most states have adopted, state courts will also refuse to hear a claim that would be untimely in the state in which it accrued. In this respect, the limitations period applicable to a cause of action appears to have become part of the same policy bundle as the cause of action itself. Since the mid-twentieth century, the Supreme Court has correspondingly understood federal statutes that create causes of action to include the applicable limitations period within their domain. State law is no longer presumed to govern that issue of its own force, but only to the extent that federal law implicitly incorporates it.

On this one issue within the same policy bundle as federal causes of action, though, modern federal statutes commonly are read to incorpo-

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228. For the most part, this problem afflicts only causes of action arising under statutes that were enacted before December 2, 1990. See infra text accompanying note 240.

229. See Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 162–63 (1987) (Scalia, J., concurring in the judgment). Justice Scalia’s invocation of the Rules of Decision Act is historically accurate but requires a word of explanation. Throughout the nineteenth century, the Supreme Court did indeed use the Rules of Decision Act to explain why state limitations periods applied in federal court. See, e.g., Campbell, 155 U.S. at 614; M’Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 277–78 (1830). This application of the Rules of Decision Act, however, seems inconsistent with the then-prevalent view that limitations periods were matters of procedural or remedial law. Wouldn’t that view of limitations periods have led the Court to invoke the Process Acts (which directed federal courts to apply the procedural rules of the state in which they sat) rather than the Rules of Decision Act (which governed more substantive matters)?

The key to this incongruity may lie in Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825), which understood the Process Acts to make federal courts follow state procedures as they had existed when the Process Acts were enacted rather than as they stood at the time of the federal suit. See Hart & Wechsler, supra note 15, at 606–07 (discussing the era of “static” conformity, which lasted until Congress adopted the Conformity Act in 1872). Shoehorning limitations periods into the Rules of Decision Act enabled federal courts to apply the same limitations periods that states were currently using, rather than whatever limitations periods the states had been using in 1789 or 1828.


231. See Scoles et al., supra note 184, at 133.

rate varying rules of state law. Part of the explanation is that canons of statutory interpretation can be "sticky"; once a canon becomes known to Congress, statutes might continue to be drafted in light of it even after the patterns of general jurisprudence that initially generated the canon have changed. In keeping with this idea, the Supreme Court has interpreted congressional silence about limitations periods as a tacit adoption of state law, because members of Congress allegedly came to expect silence to have that meaning. As a practical matter, the Court's willingness to continue borrowing limitations periods from state law may also reflect its dissatisfaction with the alternatives: The current Court unquestionably considers the judiciary ill-equipped to craft limitations periods on its own, and it might also doubt that limitations periods are the sorts of rules that general law can supply.

But whatever the reason for the continued absorption of local limitations periods into federal statutes, modern understandings of the relevant policy bundles have made this use of local law seem anomalous and troublesome. As early as 1945, a bill to substitute a generic federal limitations period was reported out of the House Judiciary Committee, and commentators kept up the call for this reform. In 1990, they got it; in a "long overdue" move, Congress enacted a residual statute of limitations applicable to causes of action under subsequently enacted federal statutes. Thus, even limitations periods are not robust exceptions to the normal principles that federal law governs issues in the same policy bundle as a federal cause of action and that courts use general rather than local law to fill gaps in those bundles.

233. Instead of relying upon varying rules of state law, the Supreme Court has occasionally "borrowed" a uniform limitations period that Congress established for some other federal cause of action. See, e.g., Agency Holding Corp., 483 U.S. at 149–50 (borrowing the limitations period for civil RICO actions from the Clayton Act). The Court has made clear, however, that this approach remains the exception and that courts normally should borrow the applicable limitations period from state law instead. See N. Star Steel Co. v. Thomas, 515 U.S. 29, 34–35 (1995).

234. See N. Star Steel, 515 U.S. at 34; Agency Holding Corp., 483 U.S. at 147.

235. See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 362 n.8 (1991) (indicating that the Court's practice of borrowing limitations periods from state law is designed to avoid a particular type of "judicial policymaking").

236. See, e.g., William Wirt Blume & B.J. George, Jr., Limitations and the Federal Courts, 49 Mich. L. Rev. 937, 992 (1951) (seeing no reason to "let[ ] state limitations fill a vacuum created by the failure of Congress to limit the time in which action on a federally-created right may be brought"); Note, Federal Statutes Without Limitations Provisions, 53 Colum. L. Rev. 68, 68 (1953) ("[T]here is a basic conflict or inconsistency in employing a state statute to determine when a federally created cause of action ceases its existence.").


238. See, e.g., Blume & George, supra note 236, at 993.


2. How to Resolve the Circuit Splits Surveyed in Part II. — The courts' agreement on those normal principles contrasts sharply with the circuit splits surveyed in Part II. As we shall see, though, those splits all involve issues that do not occupy the same policy bundle as the underlying cause of action. The splits exist because some courts have failed to appreciate the significance of this point.

a. Settlement Agreements. — We can begin with settlement agreements. Although the threshold question of whether a cause of action is "releasable" is commonly considered part of the same policy bundle as the cause of action itself,\textsuperscript{241} that policy bundle does not include questions about the validity and interpretation of particular settlement agreements. As between the parties to a settlement, American courts almost universally hold that the agreement "is to be treated as a standard contract" for choice-of-law purposes, no matter what the nature of the underlying cause of action.\textsuperscript{242} Thus, it is entirely possible for questions about the validity or interpretation of a settlement agreement to be governed by the law of a different state than questions about the scope of the underlying cause of action.

To see how this backdrop affects statutory interpretation, suppose that a plaintiff brings suit in the courts of State X under a cause of action created by the legislature of State X. If the defendant produces a settlement agreement between the parties that was negotiated, executed, and performed entirely in State Y, even State X's own courts are likely to use the law of State Y to answer questions about the meaning of the release as a contract. To be sure, if the legislature of State X so desired, it presumably could require courts within its jurisdiction to use the contract law of State X instead. But it is highly unlikely that the statute creating the underlying cause of action will be read to give this direction. As a matter of statutory interpretation, then, the policy goals that the legislature of State X intended its cause of action to achieve will not be understood to require application of State X's contract law to settlement agreements.

There is no obvious reason to assume that when Congress creates a federal cause of action, it has a broader sense of the relevant policy bundles than other American legislatures. To the contrary, if Congress does indeed legislate against the backdrop of general law—as the courts that speak of a "federal common law of release" often assume\textsuperscript{243}—then the
typical federal statute that creates a cause of action should not be read to federalize questions that everyone would agree lie beyond the domain of parallel state statutes. In the absence of any other applicable federal rule, questions about the mutual rights and duties of the parties to a release agreement are instead the province of local contract law.

By contrast, certain other questions about the legal effect of release agreements may well fall into the same policy bundle as the cause of action that is being released. Suppose, for instance, that a three-car collision occurs in State X and that one of the drivers (P) is injured by the negligence of the other two (D1 and D2). Negotiations conducted and consummated in State Y result in a settlement between P and D1, but P ultimately files suit against D2. Even though D2 was not a party to the settlement agreement and P did not intend to release any claims against him, D2 might argue that P cannot recover from him after releasing D1. This argument is not about the validity and meaning of the release as a contract, but rather about the law of torts (or joint and several liability for torts). American choice-of-law jurisprudence treats it accordingly. Traditionally, the legal effect of a release of one joint tortfeasor on the plaintiff’s claims against another joint tortfeasor has been governed by the law of the same state that supplies the underlying cause of action.244

In keeping with this traditional linkage, courts have long held that when Congress creates a cause of action, it is implicitly federalizing questions about whether a plaintiff’s release of one potentially liable party automatically shields other defendants from liability under that cause of action.245 As with other questions that occupy the same policy bundle as a federal cause of action but that do not have statute-specific answers, courts have drawn the substance of the governing rules from general American law. In the mid-twentieth century, when most American jurisdictions held that the release of one joint tortfeasor would defeat claims against others unless the parties to the release had agreed to preserve those claims,246 courts understood federal law to borrow this approach for the release of federal causes of action.247

244. See, e.g., Preine v. Freeman, 112 F. Supp. 257, 260 (E.D. Va. 1953); E.H. Schopler, What Law Governs Effect of Release of One Tortfeasor upon Liability of Another Tortfeasor, 69 A.L.R.2d 1034, 1035 (1960). Jurisdictions that have shifted to the second Restatement leave somewhat more room for issue-splitting, but they have not repudiated the traditional linkage; the second Restatement continues to treat the legal effect of a release agreement on claims against other joint tortfeasors as an issue of tort law rather than contract law. See Restatement (Second) of Conflict of Laws § 170.

245. See, e.g., Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113, 1115 (2d Cir. 1977) (“[F]ederal law governs whether a release of one joint tortfeasor releases all for purposes of federal securities law claims.”); Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 402 F.2d 83, 84 (5th Cir. 1968) (“The cases on the question establish the rule that federal law governs the effect of a release of joint tortfeasors in antitrust cases.”).

246. See Restatement of Torts § 885(1) (1934).

247. See, e.g., Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, 351 F.2d 925, 929–30 (9th Cir. 1965) (addressing the effect of a release of antitrust claims, and
jurisprudence shifted toward the position now articulated in the Restatement (Second) of Torts, under which the release of one joint tortfeasor never discharges others by simple operation of law.\textsuperscript{248} The federal rule followed the emerging trend.\textsuperscript{249} Throughout the years, though, federal jurisprudence on this point has tracked the general law of the fifty states rather than adhering to the local law of any individual state.

This fact apparently has influenced some of the circuits that apply general law to questions about the meaning and legal effect of release agreements \textit{as contracts}.\textsuperscript{250} But those circuits have overlooked the important distinctions that a proper analysis of policy bundles would highlight. When Congress creates a federal cause of action, it can plausibly be understood to be federalizing questions about the scope of joint and several liability under that cause of action, because those questions occupy the same policy bundle as the cause of action itself. As general choice-of-law jurisprudence shows us, however, questions about the meaning of release agreements as contracts fall into a different bundle. Thus, the mere fact that Congress created the underlying cause of action does not imply a decision to federalize questions about the interpretation of release agreements.

b. Assignment Agreements. — The same analysis sheds light on the assignment of federal causes of action. As we have already seen, the threshold question of assignability is widely considered part of the same policy bundle as the cause of action itself. Even when Congress has not specifically addressed this topic, questions about the assignability of federal causes of action are therefore presumed to come within the domain of federal law, and courts use principles of general jurisprudence to answer them.\textsuperscript{251}

If courts determine that a particular cause of action is assignable, however, they will face further questions about the validity and interpreta-

\textsuperscript{248} See Restatement (Second) of Torts § 885(1) (1979).

\textsuperscript{249} See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 346–47 (1971) (invoking both the policy of the federal antitrust statutes and the general rule stated in tentative drafts of the Restatement (Second) to conclude that a plaintiff who releases federal antitrust claims against one defendant "releases only those other parties whom he intends to release"); Avery v. United States, 829 F.2d 817, 819 (9th Cir. 1987) (noting that the Supreme Court’s conclusion in \textit{Zenith} "reflects the evolution of general tort principles, as illustrated by the development of the Restatement of Torts").

\textsuperscript{250} See Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1316 n.27 (5th Cir. 1983) ("Zenith intimates that a release which implicates a federally created statutory claims [sic] should be construed in light of a single federal rule rather than by application of various state rules.").

\textsuperscript{251} See supra notes 144–145, 200 and accompanying text.
tion of purported assignment agreements. American choice-of-law rules suggest that those questions of contract law occupy a different policy bundle than the underlying cause of action. Whatever the nature of the cause of action, the law that governs the mutual rights and duties of the parties to an assignment agreement is determined "in the same way that choice of law is made in other contracts cases"; there is widespread agreement that "the contract of assignment is a different matter from the transaction that created the purportedly assigned chose in action and so may be governed by a different law."252

This consensus undercuts the approach that a few circuits have taken to the assignment of federal causes of action. Invoking "the overall purposes of the antitrust statutes," for instance, the Third Circuit has held that "only an express assignment of an antitrust claim can be valid."255 The Third Circuit has assumed that the same rule governs the interpretation of contracts that allegedly assign away a plaintiff's claims under the Racketeer Influenced and Corrupt Organizations Act (RICO),254 and the Fifth Circuit has suggested that it might also govern the assignment of ERISA claims for breach of fiduciary duty.255 The alleged justification for this approach is that "federal courts have the power to create so-called 'interstitial' federal common law to govern issues closely interwoven with a broad scheme of federal statutory regulation."256 But unless Congress has a very different sense of policy bundles than other American legislatures, questions about the interpretation of assignment agreements are not really "interwoven" (in the relevant sense) with the creation of the underlying cause of action. Just as state policymakers who create causes of action are not ordinarily understood to be requiring that their own state's contract policies govern subsequent transfers of those causes of action, so too Congress's decision to create a federal cause of action does not ordinarily imply a decision to federalize contract-law questions about the meaning of assignment agreements.

C. Successor Liability. — Consensus views about policy bundles also clarify the interaction between federal statutes and matters of corporate form. Take successor liability: If someone buys the assets of a corpora-

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252. McDougal et al., supra note 186, at 628. In the absence of a choice-of-law clause in the assignment agreement, courts that follow the traditional approach apply "the law of the place of assignment." Restatement of Conflict of Laws § 350 (1934). Courts that follow the Restatement (Second) take a more holistic approach, but they too focus on the state with "the most significant relationship to the assignment and the parties to the assignment" rather than the state that supplied the underlying cause of action. Restatement (Second) of Conflict of Laws § 209 (1971).


256. Gulfstream III Assocs., 995 F.2d at 438.
tion that faces liability under a federal cause of action, under what cir-
sumstances does the liability now attach to the buyer? If no written provi-
sions of federal law seem to address this topic, should successor liability
for federal causes of action nonetheless be presumed to be a federal
matter?

Understanding the policy bundles that are relevant to this question is
complicated, because there are different substantive theories under
which a company that buys another business’s assets might be held to
have acquired its debts. To begin with, the buyer might assume some or
all of the seller’s liabilities as a matter of contract law, on the theory that
the asset-purchase agreement so provides. This theory of successor liabil-
ity plainly occupies a different policy bundle than the underlying causes
of action that generated the seller’s debts. Regardless of the source of
those debts, questions about whether the asset-purchase agreement calls
for the buyer to assume them will typically trigger the choice-of-law analy-
sis that applies to the agreement as a contract.\textsuperscript{257}

Asset-purchase transactions can also trigger successor liability as a
matter of corporate law, on the theory that the companies involved in the
transaction are no longer separate entities. Under the rules of successor
liability applied in most states, if the seller’s identity is understood to have
merged into that of the buyer, then the buyer will have acquired all of the
seller’s liabilities by operation of law.\textsuperscript{258} Like contract-law theories of suc-
cessor liability, though, this theory is not linked to the law(s) governing
each of the individual causes of action against the seller. Instead of pro-
ceeding on a debt-by-debt basis, courts typically answer the relevant ques-
tions of corporate identity wholesale, using the veil-piercing rules of the
state in which the corporations are incorporated\textsuperscript{259} or have their prin-
cipal places of business.\textsuperscript{260}

\textsuperscript{257} Indeed, courts sometimes assume that this choice-of-law analysis governs all
Supp. 728, 734 (W.D. Va. 1997); In re Asbestos Litig. (Bell), 517 A.2d 697, 699 (Del. Super.
Ct. 1986).

\textsuperscript{258} See 19 Am. Jur. 2d Corporations § 2333 (2004) (noting “the general principle of
law that, absent a governing statute or contract provision, . . . a corporation that merely
acquires the assets of another is not liable for the obligations of the transferor,” but
observing that most states recognize successor liability when the asset-purchase transaction
really amounts to a merger or consolidation, when the buyer is “a mere continuation or
reincarnation of the transferor,” or when the transaction is an attempt to defraud the
seller’s creditors).

\textsuperscript{259} See, e.g., Patin v. Thoroughbred Power Boats, Inc., 294 F.3d 640, 647 (5th Cir.
2002) (applying Louisiana choice-of-law rules); cf. Restatement (Second) of Conflict of
Laws § 307 (1971) (indicating that “[t]he local law of the state of incorporation” governs
analogous questions about when a controlling shareholder should be held liable for a
corporation’s debts as the corporation’s alter ego); Restatement of Conflict of Laws § 187
(1994) (similar).

\textsuperscript{260} See, e.g., Ryan Beck & Co. v. Campbell, No. 1:02-CV-07016, 2003 WL 21697364,
at *1 (N.D. Ill. July 18, 2003) (applying Illinois choice-of-law rules); White v. Cone-
rules).
Again, the fact that these theories of successor liability occupy different policy bundles than the claims that generate the underlying debts has a corollary: When a state legislature creates a private cause of action, it usually is not understood to be saying anything about either contract-law or corporate-law theories of successor liability. In the absence of any indication that Congress operates against a different backdrop of policy bundles than state legislatures, courts should take the same approach to federal law. If a federal statute simply creates a cause of action without addressing successor liability, courts ordinarily should conclude that these theories of successor liability lie beyond the statute’s domain. Instead of being governed by a federalized version of general law, the applicability of these theories will typically depend on the local law of a particular state.

That is not quite the end of the story, because debt-specific forms of successor liability are also possible. Under California law, for instance, if an entity acquires a manufacturing business from another corporation and continues the old product line, and if the selling corporation dissolves or otherwise becomes judgment-proof as a result of the transaction, the buyer sometimes faces strict liability for injuries caused by defects in units sold by its predecessor, even though it is not liable for the seller’s other debts. Some other states have recognized a comparable form of products liability for successor corporations when a business “has been transferred as an ongoing concern” and the seller has dissolved soon thereafter. For choice-of-law purposes, courts have tended to treat these theories as special rules of products liability, which might belong to the same policy bundle as the cause of action against the original seller.

Just as some states have understood their products-liability law to imply special rules of successor liability for injuries caused by defective products, so too particular federal statutes might be understood to erect statute-specific rules of successor liability for the debts that they create. Local state law plainly does not determine whether a federal statute establishes such rules. Still, such statute-specific rules of successor liability would cut against the grain of general American jurisprudence. Although a few


263. See, e.g., Ruiz v. Blentech Corp., 89 F.3d 320, 326–27 (7th Cir. 1996) (holding that under Illinois choice-of-law rules, the defendant’s exposure to these special theories of successor liability depended on the law of the state in which the plaintiff resided and was injured rather than on the law of California, where the defendant was incorporated); Savage Arms, 18 P.3d at 53–54 (recognizing a split of authority on this point, but concluding that Alaska law governed whether a successor corporation faced this sort of products liability for injuries suffered by Alaska residents in Alaska).
states have indeed established special rules of successor liability for injuries caused by defective products, successor liability that attaches by operation of state law (rather than by contract) is more commonly an all-or-nothing proposition: Under the approach taken by most states, an entity that buys a corporation's assets in good faith will be liable either for all of the corporation's debts or for none of them. If a federal statute says nothing about successor liability, courts should hesitate before inferring that it departs from this general principle.

C. General Law and the Federal Occupation of Certain Fields

In addition to shedding light on the circuit splits surveyed in Part II, the concept of policy bundles also illuminates the patterns described in Part I. As we saw in Part I, courts addressing enclaves that the Constitution itself has federalized, or fields that Congress has occupied by statute, often use general law to resolve substantive issues that written federal law does not address. The concept of policy bundles helps us understand which issues might be eligible for this treatment.

1. How Policy Bundles Can Clarify Statutory Preemption Doctrines. — Most federal regulatory statutes do not wholly displace state authority throughout any particular field; they trigger only "conflict preemption," not "field preemption," and so states can supplement the regulatory duties that they establish. Even within a single policy bundle, then, some of the regulated entities' duties can come from state law while others come from federal law.

264. See, e.g., Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc., 90 S.W.3d 46, 52 (Ky. 2002) (noting that California's willingness to craft special rules of successor liability for products-liability cases "remain[s] the minority position"). The majority rule arguably promotes economic efficiency by reducing the transaction costs associated with the transfer of productive assets; businesses can buy a corporation's assets and put them to more productive uses without first having to conduct separate legal inquiries for each of the different types of liability that the seller might face. For a much more sophisticated analysis of the economics of successor liability, see Albert H. Choi, Making the Buyer Responsible for the Seller's Wrongs: An Analysis of Successor Corporate Liability (Sept. 25, 2005) (unpublished manuscript, on file with the Columbia Law Review).

265. For the same reason, courts should resist the idea that because 1 U.S.C. § 5 expresses a generic intention to include "successors and assigns" whenever Congress uses the word "association" in reference to a corporation, federal statutes that impose liability on "associations" as well as other entities are thereby federalizing questions of successor liability. See B.F. Goodrich v. Betkoski, 99 F.3d 505, 518–19 (2d Cir. 1996) (endorsing this argument as applied to CERCLA), overruled by New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682 (2d Cir. 2003). Given general corporate law's hostility to debt-specific rules of successor liability, principles of general jurisprudence support reading the word "successor" in this context to mean "an entity that has assumed the association's identity under the applicable rules of local law." The fact that § 5 pairs the word "successors" with "assigns" supports this interpretation; courts surely would use the local contract law of individual states to determine whether an entity is an "assign[ee]" of the original association.

Because state law can operate within policy bundles that Congress has addressed, the fact that written federal law fails to resolve particular issues in those bundles will not always create gaps that courts should use rules of general law to fill. Instead of federalizing those issues, Congress may simply have left them to the local law of individual states. Still, even when courts reach that conclusion, federal law may implicitly limit the range of answers that state law can give. In particular, courts often understand federal statutes to displace state laws that would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."267

While the Supreme Court has made clear that the reach of this species of conflict preemption "is basically [a question] of congressional intent,"268 the Court has been imprecise about how to gauge that intent.269 Equipped with the concept of policy bundles, however, we can at least identify a fairly clear outer boundary. When considering matters in the same policy bundle that a federal statute addresses, courts often can plausibly impute to Congress an intention to displace certain state laws whose practical effects would hinder Congress's policies. But this intention should not lightly be presumed to reach matters outside the policy bundle that the federal statute addresses—matters that policymakers customarily treat separately.

To take a simple example, consider the effect of federal procurement statutes upon state tort law. Although the possibility of tort judgments against government contractors makes federal procurement programs more expensive than they would otherwise be, courts surely should not infer that ordinary procurement statutes displace state products-liability laws. While Congress might rationally decide to protect the public fisc by immunizing government contractors from certain suits, provisions addressing other policy bundles do not imply any decisions on that topic.270


268. Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 30 (1996). Past Courts have occasionally suggested that the Supremacy Clause of the Federal Constitution automatically displaces all state laws whose practical effects might hinder the operation of a federal statutory scheme, without regard to whether the relevant federal statute itself implies a rule to that effect. See, e.g., Perez v. Campbell, 402 U.S. 637, 649-52 (1971). But neither text nor history supports that view, see Nelson, Preemption, supra note 266, at 245-60, 265-76, and the modern Supreme Court has repudiated it, see id. at 277 n.167 (citing cases).

269. The Court has contented itself with the sensible observation that what counts as a sufficient obstacle "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000). This cautious formulation reflects the Court's awareness that Congress rarely pursues its purposes at all costs, and hence that judges cannot safely infer a congressional intent to displace all state laws whose practical effects might hinder the operation of a federal statute. See Nelson, Preemption, supra note 266, at 276-90.

270. See North Dakota v. United States, 495 U.S. 423, 440-41 (1990) (plurality opinion) ("It is one thing . . . to say that the State may not pass regulations which directly
Within the policy bundles that Congress has addressed, decisions about implied conflict preemption will rest primarily on specific features of the federal regulatory scheme. Still, general jurisprudence sometimes influences those decisions; for reasons discussed in the margin, courts are somewhat more likely to infer preemption when the challenged state law is an outlier than when most other states have similar rules. To a limited extent, then, general American jurisprudence can help identify the range within which states may permissibly supplement federal statutes.

General law has far more work to do when Congress decides not to share authority with the states at all, and instead makes a particular field the exclusive province of federal law. Even if written federal law fails to suggest any answers to one or more questions in the defined field, the local law of individual states cannot apply of its own force. And while it might still be possible, in theory, for courts to "borrow" varying rules of state law to answer those questions, Congress's decision to federalize the field typically cuts against this approach. Thus, when Congress has occupied an entire field without providing guidance on certain issues in

obstruct federal law; it is quite another to say that they cannot pass regulations which incidentally raise the costs to the military."). But cf. Boyle v. United Techs. Corp., 487 U.S. 500, 507–12 (1988) (finding broader preemption than this analysis would suggest).

271. See, e.g., Leipart v. Guardian Indus., Inc., 234 F.3d 1063, 1070 (9th Cir. 2000) (emphasizing that a challenged state cause of action "is well within the normal range of state tort law"). This use of general jurisprudence has two basic rationales. First, idiosyncratic state laws are more likely to escape Congress's attention than widespread ones, and so Congress's failure to include provisions expressly contradicting or displacing them may seem less significant. Second, the very oddity of a state law may be some evidence that the law does not serve important state purposes, and hence that any interference with the federal scheme is less justifiable.

In some situations, indeed, the oddity of a state law may be a sign that state policymakers were deliberately trying to undermine the federal scheme. Such discrimination against federal law is forbidden even when the state law nominally focuses on a different policy bundle. Cf. Howlett v. Rose, 496 U.S. 356, 379–80 (1990) (indicating that a state court can refuse to entertain claims made under federal law only on the basis of "neutral policy" and not because "the court disagrees with the content of federal law"). This principle is no exception to the general rule limiting implied conflict preemption to the policy bundles that Congress has addressed; when state policymakers are trying to defeat federal rights, their policies are really directed toward those very bundles.

272. The most obvious reason for Congress to federalize an entire field is simply that members of Congress perceive a strong need for uniformity within that field. Understanding federal law to incorporate varying rules of state law would be in tension with that perceived need.

Even if members of Congress do not think that uniformity is necessary for its own sake, they might sometimes embrace field preemption on the theory that case-by-case analysis of whether particular state laws are hostile to federal policy would generate too many mistakes. Especially when the federal scheme involves many moving parts, members of Congress might fear that courts conducting ordinary conflict-preemption analysis would miss ways in which state laws in the same field hinder operation of the federal statutory scheme. Again, however, this rationale for field preemption seems incompatible with judicial authority to decide that the federal statutory scheme "borrows" whatever rules of state law the courts deem consistent with federal policy.
that field, it is natural for courts to draw the necessary federal rules of
decision from general law—just as Part I described.

As with conflict preemption, the concept of policy bundles can help
to illuminate the scope of field preemption, and hence the extent to
which federal law might create gaps for principles of general jurispru-
dence to fill. Especially when field preemption is implied rather than
express, courts must infer the boundaries of the occupied field from the
substantive regulations that Congress adopted, and those regulations
should not ordinarily be understood to strip the states of lawmaking
power over policy bundles that Congress said nothing about. After all,
the primary reason for inferring field preemption is that the policies en-
acted by Congress imply a special need for uniformity and therefore pre-
clude supplementary state rules on the same subjects. This rationale ap-
plies more naturally to issues that policymakers typically link together
than to issues in other policy bundles.

2. Policy Bundles and the Enclaves Federalized by the Constitution. — The
concept of policy bundles also helps us demarcate the enclaves in which
the Constitution itself displaces state law. To be sure, each of those en-
claves encompasses many different policy bundles. The enclave of mari-
time law, for instance, covers topics as varied as the interpretation of mar-
time contracts, the definition of maritime torts, the salvage of property,
and the duties of masters and servants. But policy bundles are still the
quantum units that constitute the enclave. In particular, the enclave
should not spill beyond the policy bundles on which maritime law estab-
lishes rules.

To appreciate this point, return to the case of Wells v. Liddy,273 in
which G. Gordon Liddy allegedly had defamed the plaintiff both on a
cruise ship and on land.274 If the parties settled these claims, the mere
fact that one of the claims came from general maritime law surely would
not make the settlement agreement a "maritime contract"; the interpreta-
tion of settlement agreements has long been understood to occupy a dif-
f erent policy bundle than the claims that are being settled, and so the fact
that the Constitution federalizes one of those claims does not suggest that
it also federalizes interpretation of the settlement agreement.275

273. 186 F.3d 505 (4th Cir. 1999).
274. See supra text accompanying notes 71–74.
275. Admittedly, current case law is just as muddled on this point as it is with respect
to the settlement of other federal claims. Compare Stipelcovich v. Sand Dollar Marine,
Inc., 805 F.2d 599, 602, 603 n.4 (5th Cir. 1986) (using state law to interpret an agreement
releasing claims under the Jones Act and general maritime law), with Mid-S. Towing Co. v.
Har-Win, Inc., 733 F.2d 386, 389 (5th Cir. 1984) (suggesting that these questions might
instead be governed by federal law). When a professional seaman executes a release in
favor of his employer, the matter is also complicated by the potential relevance of master-
servant issues that maritime law does address. Cf. Garrett v. Moore-McCormack Co., 317
U.S. 239, 247–48 (1942) (analogizing the seaman’s employer to a fiduciary and indicating
that federal maritime law forbids the employer to take unfair advantage of the seaman in
obtaining a release).
Arguments of this sort occasionally will raise difficult questions about whether to assess the enclaves that the Constitution federalizes according to Founding-era views of the relevant policy bundles or according to modern views. But those questions will not matter as often as one might think. With respect to the issues that we have just been considering, for instance, Founding-era materials about the conflict of laws are consistent with the traditional rule of lex loci contractus still applied in some states.\(^{276}\) There is no reason to suspect that the Constitution links contract-law questions about settlement agreements with questions about the underlying causes of action.

Of course, even if two questions fall into different policy bundles, they sometimes will independently trigger federal law. Suppose, for instance, that a federal statute gives the United States a cause of action against some private party and that the government enters into a contract settling its claims. As we have seen, questions about the proper interpretation of the settlement agreement are likely to lie beyond the domain of the statute that supplied the federal cause of action. But while the statute does not federalize those questions, courts must also consider the separate effects of the Constitution. Questions about the government's rights and obligations under the settlement agreement, like questions about the government's rights and obligations under other contracts to which it is a party, fall into one of the enclaves that the Constitution is said to federalize. In the absence of guidance from written federal law, courts use principles of general jurisprudence to answer such questions.\(^{277}\)

The role of policy bundles in determining the presumptive domain of federal law is therefore complicated. In order to analyze particular cases, courts sometimes will have to consider both the policy bundles relevant to some federal statute and the policy bundles relevant to enclaves federalized by the Constitution itself. Only if the question at hand falls into neither set of policy bundles can the courts safely conclude that it falls outside the domain of federal law. Still, careful attention to the concept of policy bundles will put the use of general law in federal jurisprudence on a more logical footing than it currently enjoys.

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276. See, e.g., Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 n.* (1797) (reporter's note) (supplying a translation of Huber's \textit{De Conflictu Legum}); see also Samuel Livermore, Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations 108 (New Orleans, Benjamin Levy 1828) ("\textit{The law of the place of contract ... most commonly furnishes the rule for the government of contracts.}").

277. See, e.g., Smith v. United States, 328 F.3d 760, 767 n.8 (5th Cir. 2003) (per curiam) ("Whether there is an agreement [between the I.R.S. and the Smiths] is governed by the federal common law of contracts, which uses 'the core principles of the common law of contracts' that are in force in most states." (quoting United States v. Nat'l Steel Corp., 75 F.3d 1146, 1150 (7th Cir. 1996))); United States v. Andreas, 216 F.3d 645, 663 n.5 (7th Cir. 2000) ("Federal courts look to general principles of contract law to interpret a plea or immunity agreement [between the federal government and a potential criminal defendant].").
3. The Idea that Federal Common Law Sometimes "Borrows" State Law. — The principal challenge to the framework that I have been developing comes from a peculiar feature of modern doctrine. Even within fields that Congress or the Constitution is said to have federalized, courts sometimes hold that the applicable rules of federal common law simply "borrow" their content from the local law of individual states. This approach is obviously an alternative to the patterns that I have described, in which courts routinely draw upon general jurisprudence to fill gaps created by the federal occupation of a particular field.

Again, though, the concept of policy bundles helps us understand what courts are doing. We can begin with federal statutes. As we saw in Part II, judicial precedents sometimes take unduly broad views of the domains that Congress has occupied; they unjustifiably assume that Congress meant to federalize issues in policy bundles that Congress has not addressed. For later courts that are bound by these precedents, the idea that the applicable rules of federal law simply incorporate the local law of individual states is a way of restoring state law through the back door, thereby approximating the results that a proper analysis of policy bundles would have produced in the first place.

Decisions about the release of federal causes of action provide numerous examples of this phenomenon. In one recent case, for instance, the Second Circuit acknowledged its past statement that "federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action," but went on to conclude that in the absence of "any congressional directive instructing us to formulate a uniform federal standard," the applicable rules of federal law simply incorporate varying rules of local law. The Ninth Circuit has used the same maneuver; though constrained by prior case law to conclude that "federal law always governs the validity of releases of federal causes of action," it has held that "state law should provide the general content of federal law" with respect to the interpretation and validity of releases of certain claims under CERCLA. These decisions are best understood as a convoluted way of cutting back on the overfederalization produced by earlier circuit precedent.

The same pattern is apparent in some of the enclaves that the Constitution has been held to federalize. Take the proprietary interests of the federal government. In United States v. Kimbell Foods, Inc., the Supreme Court understood its precedents to mean that when a debtor has bor-

278. See, e.g., Friendly, In Praise of Erie, supra note 10, at 410 (observing that even when an issue comes within the domain of federal law, courts must decide whether to "adopt a uniform nation-wide rule or . . . follow state law").
280. VKK Corp. v. Nat'l Football League, 244 F.3d 114, 121–22 (2d Cir. 2001) (borrowing state law to decide "whether a release of antitrust claims is invalid on the basis of economic duress").
rowed money from both private creditors and the federal government, federal law determines the priority of the government’s right to repayment. But the Court did not think that structural considerations really argued against applying the local law of individual states. The Court concluded that the relevant state’s law should therefore be “incorporated as the federal rule of decision,” except to the extent that use of a particular state rule would “frustrate specific objectives of the federal [lending] programs” that Congress had established.

This holding can be understood in several ways. Perhaps the Court was having second thoughts about the breadth of the field that the Constitution really federalizes and was trying to cut back on its precedents without directly overruling them. Or perhaps the Court simply understood those precedents to rest on grounds that did not carry the normal consequences of field preemption. The Court might have thought that the precedents were clever ways of preserving the role of state law in the relevant field while avoiding some of the unfortunate aspects of the *Erie* doctrine. Or the Court might have thought that the precedents rested on purely formal ideas about states’ inability to regulate the federal government’s operations and did not reflect any functional reason for government lenders to face different rules than other lenders in the same marketplace.

Whichever understanding one prefers, the bottom line is the same: Within the areas in which federal law incorporates varying rules of state law, the Constitution establishes a system more akin to conflict preemption than to ordinary forms of field preemption. For practical purposes, after all, holding that federal law applies but that it incorporates whatever state law says (except where state law is contrary to the objectives of fed-

283. See id. at 727-40.
284. Id. at 728. Before the modern Supreme Court began dropping strong hints that state law can govern certain maritime matters of its own force, see supra note 63, courts sometimes took the same approach in admiralty cases, see, e.g., Palestina v. Fernandez, 701 F.2d 438, 439 (5th Cir. 1983) (understanding nominally federal maritime law to incorporate Louisiana tort law with respect to a “garden variety” tort occurring on Louisiana waters).
285. In a classic 1957 article, Professor Mishkin suggested that courts could cabin some ill-advised rules then associated with the *Erie* doctrine by holding that state law applied to certain issues only by virtue of its incorporation into federal law. See Mishkin, supra note 2, at 806-10. At the time, for instance, some opinions indicated that in the absence of any authoritative pronouncements from a state’s highest court, federal judges hearing cases like *Erie* might be bound to accept whatever lower state courts said about the content of state law. Professor Mishkin suggested that courts might be able to confine this doctrine—which scholars had sharply criticized—to cases in which state law applied of its own force. See id. at 808-10. The same technique also offered a way to limit the pernicious consequences of the *Klaxon* doctrine, under which federal district courts hearing cases like *Erie* must use the choice-of-law rules of the state in which they sit. As Professor Mishkin explained, if state law applies only by virtue of its incorporation into federal law, courts might be able to use federal choice-of-law rules to decide which state’s law is relevant. See id. at 806-08.
eral statutes in the same field) is little different from holding that state law operates of its own force (but is subject to a species of conflict pre-emption). Under either approach, state law has not really been ban-
ished from the relevant field. The relevance of the local law of individual states in cases like *Kimbell Foods* therefore does not undercut the role of general law within enclaves that the Constitution has more fully federalized.

It is harder to make sense of a few cases involving the operation of federal district courts. Just as the Constitution does not let states regulate how other branches of the federal government conduct their business, so too states have only limited control over the procedures and actions of the federal judiciary. To the extent that written federal law does not itself address those matters, courts routinely apply a species of federal common law. On two important matters in this field, however, the Supreme Court has understood the applicable rules to incorporate the local law of individual states: As a matter of federal law, federal district courts hearing cases like *Erie* are supposed to borrow the choice-of-law rules of the state in which they sit, and the local law of the state in which they sit will also determine the preclusive effect of their judgments.

These two features of current practice do not fit the pattern that I have been discussing; they are exceptions to the normal idea that when written federal law fails to suggest answers to questions that are genuinely within the federal domain, the Court draws the necessary rules from general jurisprudence rather than from the local law of individual states. But the rationales for both exceptions are quite narrow, and these two exceptions therefore provide little support for “borrowing” varying rules of state law in other genuinely federal fields. In the Justices' minds, the reason for federal common law to piggyback upon state preclusion and choice-of-law rules seems to be linked (in some unarticulated way) to the idea that “a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State.”

The Supreme Court does not use the law of individual states to determine the preclusive effect of judgments rendered by federal courts in federal question cases; consistent with the

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286. The current Supreme Court recognizes as much. See O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994) (“The issue in the present case is whether the California rule of decision is to be applied . . . , and if it is applied it is of only theoretical interest whether the basis for that application is California's own sovereign power or federal adoption of California's disposition.”); Boyle v. United Techs. Corp., 487 U.S. 500, 507 n.3 (1988) (“We see nothing to be gained by expanding the theoretical scope of the federal pre-emption beyond its practical effect . . . .”).


pattern discussed above, the Court instead applies uniform rules of federal common law, the content of which comes primarily from general American jurisprudence. Likewise, when state law is relevant to a federal cause of action, many circuits draw the necessary choice-of-law rules from the Restatement (Second) of Conflict of Laws rather than from the local law of any single state.

There is a second reason not to draw broad lessons from the fact that in cases like *Erie*, the federal courts' choice-of-law rules incorporate the local law of individual states. Even in the specialized context of diversity jurisdiction, arguments originally advanced by Michael McConnell expose serious problems with that practice. Imagine that the policymakers of a particular state, which has many consumers but relatively few manufacturers, want to draw wealth into the state and do not care about the costs that their policies impose on other states. They therefore enact products-liability laws designed to generate large awards for in-state consumers against out-of-state manufacturers, and they simultaneously adopt choice-of-law rules permitting aggressive application of their own state's laws to a wide range of interstate transactions. As originally conceived,

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290. Even before *Erie*, the Supreme Court treated the preclusive effect of a federal court's judgment as a question of federal law. When the federal judgment involved "questions of national authority and jurisdiction" rather than simply the administration of state law, moreover, even state judges were supposed to accept the federal Supreme Court's understandings of the applicable rules of general law. See *Deposit Bank v. Frankfort*, 191 U.S. 499, 514–20 (1903).

Again, trends in modern American case law highlight the connection between general jurisprudence and the substance of federal res judicata doctrine. Consider, for instance, the fate of the traditional requirement of "mutuality," which permitted litigants to benefit from the issue-preclusive effects of a past judgment only if they would also have been bound by those effects. See Restatement of Judgments § 93 (1942). When this requirement held sway in general American jurisprudence, the Supreme Court enforced it as part of the federal common law of res judicata. See *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329–30 (1955); *Triplett v. Lowell*, 297 U.S. 638, 642–45 (1936). But when courts began to move toward the more lenient position now articulated in the Restatement (Second) of Judgments § 34 (1982), federal common law followed the general trend. See *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 324–26, 349–50 (1971) (citing a strong trend toward permitting at least defensive nonmutual uses of issue preclusion); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330–31 (1979) (permitting certain offensive nonmutual uses of issue preclusion too, in accordance with a tentative draft of the second Restatement). More recent federal cases continue to base the federal common law of res judicata largely upon the Restatement (Second) of Judgments. See, e.g., *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055–56 (Fed. Cir. 2003) (citing Restatement (Second) of Judgments §§ 18, 24); *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226–27 (10th Cir. 1999) (same for § 24); *CoreStates Bank, N.A. v. Huls Am.*, Inc., 176 F.3d 187, 197–98 (3d Cir. 1999) (same for § 26).

291. See supra note 192.


293. Cf. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 495–97 (1928) (observing that diversity jurisdiction was created to protect out-of-state litigants not only against biased decisions by state courts but also against overreaching by state legislatures).
diversity jurisdiction would undercut such schemes: Although the state’s choice-of-law rules would bind the state’s own courts, an out-of-state manufacturer who was sued by an in-state consumer could remove the case to a federal court, which would apply the state’s products-liability laws only if general choice-of-law rules supported that result. But after *Klaxon Co. v. Stentor Electric Manufacturing Co.*, federal courts hearing state causes of action must borrow the choice-of-law rules of the state in which they sit.\(^{294}\) Largely because of *Klaxon*, diversity jurisdiction no longer checks states’ tendencies to favor in-state interests by extending the reach of certain laws beyond their own borders.\(^{295}\)

By increasing the short-run gains that individual states could capture if they deviated from traditional choice-of-law rules, *Klaxon* may even have contributed to the explosion of different choice-of-law regimes. In 1941, when *Klaxon* was decided, state courts widely agreed upon a set of choice-of-law rules that were “relatively even-handed and uniform.”\(^ {296}\) Within just thirty years, that consensus had collapsed in favor of a variety of new approaches, which share a “pronounced tendency to allow state courts to apply forum law.”\(^ {297}\)

Of course, *Klaxon* was not solely responsible for the conflicts revolution.\(^ {298}\) Now that the revolution has occurred, moreover, it might be hard for the Supreme Court to do anything other than adhere to *Klaxon*; like the limitations periods applicable to federal causes of action,\(^ {299}\) the choice-of-law rules applied by federal courts might be another area in which “general” law does not supply sufficiently determinate principles, and in which courts therefore have little choice (absent congressional action) but to borrow the local law of individual states. Still, *Klaxon* should not be seen as a broad precedent for incorporating local law on matters that general American jurisprudence could govern. Not only is its apparent rationale quite narrow, but *Klaxon* itself illustrates the dangers of letting the local law of individual states govern matters that seem intrinsically federal.

**CONCLUSION**

This Article has demonstrated the considerable extent to which both federal statutes and purer areas of federal common law are understood to

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294. 313 U.S. 487, 496 (1941).
297. Id. at 121.
298. Cf. Symeonides, supra note 185, at 1269–77 (cataloguing various reasons why judges might prefer the second Restatement to the first, and suggesting that the courts’ desire for more discretion in individual cases helped to drive the conflicts revolution).
299. See supra note 235 and accompanying text.
incorporate rules distilled from the common practices of other relevant jurisdictions. To be sure, it is possible for federal law to be made out of whole cloth by national policymakers, and it is also possible for federal law to incorporate (or leave undisturbed) the varying rules of individual states. But some federal rules of decision are not so closely linked to any single jurisdiction. Rather than simply reflecting the law in one jurisdiction, they instead reflect doctrines that most states have adopted as a matter of state law.

This phenomenon has several important consequences. As we have seen, for instance, courts articulating rules of federal common law do not assert such freewheeling discretion as is often supposed; general law significantly constrains, and often entirely defines, the substance of the rules of decision that they apply. By the same token, respected statements of general jurisprudence—such as the various Restatements published by the American Law Institute—play a more direct role than is commonly appreciated in influencing the content of our law. In addition to exerting a hortatory influence on state courts, the Restatements' assessments of general American law often provide the rules of decision that judges use to fill gaps in federal statutes or to handle issues that arise in enclaves of pure federal common law.

Calling attention to the persistence of general law is the first step in regularizing its use. It is perfectly appropriate for courts to draw upon general law to answer questions that lie within the federal domain but that written enactments fail to resolve; there are many questions of federal law that ought not to be controlled by the law of any individual state, but as to which state jurisprudence in general is quite relevant. If federal policymakers do indeed operate against the backdrop of general law, however, then principles of general law suggest some limitations on the reach of the resulting policies. In particular, the policy bundles that general American jurisprudence identifies let us make real progress in thinking about the domain of federal law and the extent to which the creation of one federal rule of decision implicitly federalizes related issues.

Unfortunately, some courts have failed to recognize the limits suggested by this analysis. When federal law creates a cause of action, for instance, judges sometimes assume that federal law must also govern questions that plainly lie in different policy bundles. While some courts have gone on to conclude that the applicable rules of "federal" law simply borrow the local law of individual states, others have proceeded as if these issues really belong within the domain of federal law: In the absence of guidance from written law, they have drawn the applicable rules of decision from general American jurisprudence. The failure of these judges to respect the relevant policy bundles has thus produced an ironic result. Seven decades after Erie, some modern-day courts are actually overusing rules of general law.