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CONSENT DECREES AND FEDERAL JURISDICTION

Tobias Barrington Wolff*

When a federal court enters a consent decree, it creates a hybrid that is part contract, part judgment, and in some cases part injunction. If a subsequent dispute arises between the parties concerning the performance or enforcement of the decree and a federal court is asked to adjudicate that dispute in a newly-filed action, when does the federal court have subject-matter jurisdiction and what are the analytical foundations of that jurisdiction? Careful answers to these questions draw together multiple strands of jurisdictional and remedies doctrine that have not been fully specified in the case law or the scholarly literature. That is the primary task of this Article. Weaving those strands will require a dive into deep conceptual terrain to examine the relationship between federal common law, federal subject-matter jurisdiction, the source of the rule applied in a case governed by federal common law, the distinction in the law of remedies between seeking to enforce the contractual components of a consent decree and requesting enforcement of an injunction, and questions of venue and forum selection.

One of the better judicial treatments of these issues and a useful example I will employ in this Article arises out of a case seeking enforcement of the *Flores* settlement, a consent decree that defines the obligations the United States government bears to children who arrive at the U.S. border as immigrants and asylum

* Jefferson Barnes Fordham Professor of Law, University of Pennsylvania Law School. I am deeply grateful to Bridget Cambria, Amy Maldonado, Michael DePrince, Anthony Vale and Adam Garnick for their colleagueship and partnership in advocating on behalf of the young girl whose case helped to make the law a little better and for trusting me to present an account of subject-matter jurisdiction in the enforcement of consent decrees that had not yet found voice in the federal courts. Because of our work together, that young girl is now living free with her family and a proper account of jurisdiction and consent decrees has now found its voice in the Federal Reports. Sincere thanks also to Nithya Pathalam and Seth Rosenberg for excellent research assistance and to the editors of the *University of Pittsburgh Law Review* for inviting me to participate in this celebration of Professor Rhonda Wasserman's career and to use their platform to present this work.

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seekers and are detained by federal authorities.[1] During the presidential administration in power from 2017 to 2021, the government adopted a policy called Migrant Protection Protocols ("MPP") that misapplied several provisions of federal immigration law in service of a brutally punitive policy of sending lawful asylum seekers to be homeless in Mexico while awaiting their hearings.[2] The *Flores* settlement clearly prohibited the government from applying this practice to children but the government took the position that federal district courts outside the Central District of California, which issued the *Flores* consent decree, had no subject-matter jurisdiction to enforce the decree despite express provisions in the settlement authorizing enforcement in any federal district where a child is detained.[3] Prior judicial treatment of the issue had focused on inapt questions of ancillary or derivative jurisdiction and failed to perform a careful analysis of the foundational questions of original jurisdiction in a case involving a decree that has its origins in federal authority.[4] The U.S. Court of Appeals for the Third Circuit rejected the government's position and affirmed the power of any federal district court to exercise original subject-matter jurisdiction over the prospective enforcement of a consent decree like the *Flores* settlement.[5]

Flores involved a decree that was thoroughly federal in character: an agreement binding the U.S. government to certain obligations toward children who arrive at the U.S. border seeking admission or asylum, a collection of issues long recognized to

[1] Stipulated Settlement Agreement, Flores v. Reno, No. 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Consent Decree].

[2] *See* Innovation L. Lab v. Wolf, 951 F.3d 1073, 1082–87 (9th Cir. 2020) (describing controlling statutory provisions and holding that the government's argument in support of the MPP program "ignores the statutory text, the Supreme Court's opinion in [a controlling case], and the opinion of its own Attorney General"), *vacated as moot following voluntary cessation of the program*, 141 S. Ct. 2842 (2021).

[3] *See generally id.*; *see also Flores* Consent Decree, *supra* note 1.

[4] *See, e.g.*, W.S.R. v. Sessions, 318 F. Supp. 3d 1116, 1128–29 (N.D. Ill. 2018) (finding subject-matter jurisdiction to hear a claim on the *Flores* consent decree "because the original *Flores* case itself . . . was premised on federal-question jurisdiction"); Hernandez-Culujay v. McAleenan, 396 F. Supp. 2d 477, 484–85 (E.D. Pa. 2019) (rejecting subject-matter jurisdiction to enforce *Flores* consent decree based in part on application of ancillary jurisdiction principles of *Kokkonen v. Guardian Life Insurance*), *rev'd*, 950 F.3d 177 (3d Cir. 2020).

[5] The reported decision, which includes a description of the MPP program and its enforcement against the six-year-old girl from Guatemala and her father who were the plaintiffs in the case, is *E.O.C.H. v. Sec'y United States Dep't of Homeland Sec.*, 950 F.3d 177 (3d Cir. 2020). I served as co-appellate counsel for the minor claimant in *E.O.C.H.* and briefed and argued the subject-matter jurisdiction issue before the Third Circuit.

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be matters of plenary and exclusive federal concern.[6] Although there were some questions to consider about which federal court an enforcement action should be brought to as a matter of venue, any suggestion that an action of this description must be brought to a state court would be absurd. Many federal consent decrees lack some or all of these features: the federal government may not be a party; the subject-matter of the decree may not be inherently federal in nature; the agreement may involve monetary payments in addition to or instead of injunctive relief. When the court that issues the decree explicitly retains jurisdiction over its administration and the parties return to the issuing court to seek enforcement, the Supreme Court has treated the matter as one of ancillary jurisdiction.[7] That designation and the Court's analysis in reaching it have left uncertainty as to the available grounds for original jurisdiction over newly-filed actions to enforce federal consent decrees, particularly when the action is brought in a federal court different from the one that issued the decree.

The issues this Article surveys to address that question of original jurisdiction rest on a shared analytical foundation: federal consent decrees are creatures of federal common law. Indeed, as I will argue, they are a singular and extraordinary exercise of the judicial lawmaking power of federal courts and the rights they bring into existence depend on federal authority for their binding force, even when the underlying dispute is based on state law. However, those federally created rights do not always look to a federal rule of decision for their substantive content. As the Court explained in the early post-*Erie* period when it began to reframe federal common law in positive-law terms, "state law [is sometimes] absorbed, as it were, as the governing federal rule [in a case involving federal common law] not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy."[8] Although a federal consent decree creates rights that rest on federal authority, claims to enforce that decree may not arise under federal law and hence not fall within the original jurisdiction of federal district courts if there is no sufficient basis in federal policy for a distinctively federal rule of decision. The Court's recondite holding in *Shoshone Mining Company v. Rutter*[9] provides a key part of the jurisdictional framework on this issue while

[6] *Flores* Consent Decree, *supra* note 1, ¶ 24(B) at 14.

[7] Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994).

[8] Bd. of Comm'rs of Jackson Cty. v. United States, 308 U.S. 343, 351–52 (1939) (citations omitted); *see also* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1848, 1869–70 (2017) [hereinafter Wolff, *Choice of Law and Jurisdictional Policy*] (discussing the post-*Erie* cases addressing this analytical question).

[9] 177 U.S. 505 (1900).

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foundational rulings like *Clearfield Trust v. United States*[10] and *Semtek International v. Lockheed Martin*[11] help specify when a federal rule of decision will govern an action to enforce a consent decree. This Article seeks to draw all these analytical strands together into a comprehensive account of original jurisdiction over actions to enforce federal consent decrees.

It is an honor and also fitting to present this analysis in a *festschrift* celebrating the career of Rhonda Wasserman. Professor Wasserman's work exemplifies that elusive harmony in procedure scholarship between the theoretically sophisticated and the pragmatically useful. Writing on the litigation process from preliminary injunction to class action judgment and confronting difficult questions of interjurisdictional policy at the juncture of family law and LGBTQ parents and children, Professor Wasserman has chosen her subjects with a palpable concern for real-world impacts and tackled those subjects with rigor and integrity. Her writing has been one of my scholarly models.

I. CONSENT DECREES AS FEDERAL COMMON LAW

A consent decree is the product of federal common law: a positive act of substantive judicial lawmaking. When a district court enters a consent decree, it takes what would otherwise be a private settlement agreement between the parties and crafts an order that "looks like and is entered as a judgment."[12] That formal step imbues the parties' agreement with the enforcement authority of the federal judiciary, an exercise of judicial power that mobilizes remedial tools that would not otherwise be available and imposes new constraints on the parties and the court. It makes the contempt power available as a potential tool for enforcement, introduces active judicial supervision that would otherwise be unauthorized,[13] and places limits on the ability of government defendants to alter or repudiate what would otherwise be purely contractual obligations.[14] As the Sixth Circuit has succinctly written, "[a]

[10] 318 U.S. 363 (1943).

[11] 531 U.S. 497 (2001).

[12] Loc. No. 93 Int'l Ass'n of Firefighters AFL-CIO v. City of Cleveland, 478 U.S. 501, 518 (1986).

[13] *Id.*

[14] This last point is explored in depth in Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problem with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637 (2014). Professor Morley gives the most in-depth examinations of consent decrees and the Article III requirement of adversariness in the literature and explores the serious implications of a government consent decree's capacity to bind future administrations to a resolution of a lawsuit that a court might not have been able to enter as an adjudicated remedy. While he comes to some conclusions I do not share,

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consent decree is a settlement agreement subject to continued judicial policing."[15] This singular feature of the federal consent decree in turn defines the analytical structure of the subject-matter jurisdiction that courts employ when administering decrees and adjudicating disputes that arise under them. As Parts II and III explain, the fact that consent decrees are the product of substantive federal common law does not wholly answer the question of original subject-matter jurisdiction, but it provides the framework within which the jurisdictional analysis unfolds.

The standard starting point when describing a federal consent decree is to observe that such decrees have aspects of both contracts and judicial orders or judgments. The Supreme Court regularly leads with this observation in decisions that address the federal doctrine of consent decrees,[16] often emphasizing the ambiguity of the device and finessing analytical precision in the process.[17] It will thus be useful to start with a brief account of the doctrinal features of federal consent decrees reflected in the Court's cases.

When parties involved in a dispute before a federal court decide to negotiate a voluntary resolution and have their agreement incorporated into a court order, two actions are required to make that resolution a consent decree: the agreement of the parties, and the approval of the district court.[18] No statutory authorization is needed, and no Federal Rule of Civil Procedure authorizes or defines such decrees.[19] Indeed, the Supreme Court has sometimes labored to avoid constructions of federal statutes that would preclude a consent decree, holding in a case involving Title VII of the Civil Rights Act of 1964 that statutory text placing limits on the remedies a federal

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including the belief that federal consent decrees are categorically illegitimate and should be prohibited altogether, reading his analysis sharpened my thinking in some important ways. *See generally id.*

[15] United States v. Bd. of Cnty. Comm'rs of Hamilton Cnty., 937 F.3d 679, 688 (6th Cir. 2019) (quotation and internal alterations omitted).

[16] *See, e.g.*, Martin v. Wilks, 490 U.S. 755, 788 n.27 (1989) ("Because consent decrees 'have attributes both of contracts and judicial decrees,' they are treated differently for different purposes.") (citation omitted); United States v. ITT Cont'l Baking Co., 420 U.S. 223, 236 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders.").

[17] As Professor Mengler observed in a classic treatment of the issue, by emphasizing the hybrid nature of consent decrees, the Court "shoulders two burdens: first, to identify when lower courts should treat consent decrees as contracts and when as judicial acts; and, second, to justify the differing treatment. The Court has done neither." Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. REV. 291, 292–93 (1989).

[18] *See* Mengler, *supra* note 17, at 294.

[19] *Id.* at 292.

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court can order when adjudicating a dispute must "unmistakably intend[] to refer to *consent* decrees" in order to foreclose those remedies in negotiated decrees as well.[20]

The obligations imposed by a consent decree need not fall within the range of remedies a district court would be authorized to impose after adjudicating the parties' claims. Parties can "undertak[e] to do more than the Constitution [or other applicable law] itself requires" and "more than what a court would have ordered absent the settlement" when binding themselves to a consent decree, and the court can still imbue the resulting settlement with the full weight of its contempt-based enforcement authority when they do.[21] The Supreme Court has summarized this proposition by saying that, "in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree" and hence "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree."[22]

When a consent decree in a dispute based on federal law takes effect, the obligations it imposes on the parties supersede any contrary state law, even if the federal cause of action underlying the suit and the remedies the court could have imposed in an adjudicated resolution would not have displaced the state provisions. As the Sixth Circuit said in a CERCLA dispute, although the federal cause of action itself and associated judicial remedies may not preempt state law claims, "once the consent decree is entered by a federal court—giving the decree the force of law—alternative state remedies [incompatible with the decree] may not be pursued."[23] Some federal circuit courts have imposed a clear-statement requirement before finding preemption based on a consent decree,[24] but there is broad recognition that

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[20] Loc. No. 93, Int'l Ass'n of Firefighters AFL-CIO v. City of Cleveland, 478 U.S. 501, 519, 525 (1986).

[21] Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 389 (1992).

[22] *Loc. No. 93*, 478 U.S. at 522, 525; *see also* United States v. Armour & Co., 402 U.S. 673, 681–82 (1971). "[T]he *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve."). Professor Mengler has argued with some force that the Court sometimes moves between the contract account and the judgment account of consent decrees opportunistically to lend force to the outcome it thinks just or preferable in a dispute. *See, e.g.*, Mengler, *supra* note 17, at 296–99. I do not engage at length with Professor Mengler's criticism of the Court's analysis or motives. For present purposes, my aim is to survey the positive-law state of consent decrees in the Court's jurisprudence.

[23] United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1454–55 (1991).

[24] *See, e.g.*, Doe v. Pataki, 481 F.3d 69, 77–78 (2d Cir. 2007) (recognizing the ability of a consent decree to preempt state law and foreclose subsequent changes to state law that would be inconsistent with the decree, but requiring "a clear indication" in a decree "that a state has intended to surrender its normal

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the power exists.[25] I am not aware of any modern precedent on the question whether preemption of this kind would also apply in the case of a federal consent decree resolving state-law claims that are in federal court based only on diversity, a question I return to in Part III when exploring the relationship between the source of a consent decree's authority and the source of the rule that governs its substantive scope.

The preferences of the parties are not wholly unconstrained when crafting a consent decree; the Court has imposed some parameters on the permissible scope of a decree's substantive reach. A consent decree must "com[e] within the general scope of the case made by the pleadings" and "must further the objectives of the law upon which the complaint was based."[26] And whatever its relationship to the scope and objectives of the original suit, the decree cannot "conflict[] with or violate[] the statute upon which the complaint was based" or "otherwise [be] shown to be unlawful."[27] In this important respect, the contractual elements of a consent decree are distinct from an ordinary settlement. An ordinary settlement agreement need have nothing to do with the scope of the case made by the pleadings or the objectives of the law upon which the complaint was based. In a private settlement, the parties can resolve a personal injury lawsuit resulting from a car crash with a promise by the defendant to take plaintiff to Dollywood once a year for the next decade. A consent decree has many attributes of a contract, but it is not a mere ancillary product of a contractual arrangement between the parties. Consent decrees also have a positive-law life of their own with substantive requirements that are not controlled by the parties' desires or intent.

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authority to amend its statutes"); Gen. Motors v. Abrams, 897 F.2d 34, 41–43 (2d Cir. 1990) (applying cautionary approach to field preemption under federal statutes to the question whether a consent decree has a similarly broad preemptive effect on state law).

[25] The Fifth Circuit has created a carveout to this principle of preemption in cases involving consent decrees that require race-conscious affirmative action, treating such undertakings as presumptively disfavored and holding that a city or state cannot voluntarily enter into such a program through a federal consent decree when the obligations of the decree would violate state law. *See* Dean v. City of Shreveport, 438 F.3d 448, 463–64 (5th Cir. 2006) ("As far as preemption is concerned, a voluntary consent decree has the same effect on state law as does a voluntary affirmative action program—none."). The Fifth Circuit purported to rely on Eleventh Circuit precedent for this proposition, but the case it cited involved a finding that an affirmative action consent decree stood in violation of federal statutory law, see Birmingham Reverse Discrimination Emp. Litig., 833 F.2d 1492, 1500–01 (11th Cir. 1987) (stating that consent decree cannot violate Title VII), which of course would place the decree outside the requirements demanded of every such instrument.

[26] *Loc. No. 93*, 478 U.S. at 525 (first quotation citing Pacific R.R. Co. v. Ketchum, 101 U.S. 289, 297 (1880)).

[27] *Id.* at 526.

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Beyond these substantive requirements, the Court has not offered much guidance about the principles that should inform a district court's discretion in deciding whether to approve a proposed consent decree. The courts of appeals have generally settled on the exhortation that district courts should review a decree for "fairness, reasonableness, and adequacy" when deciding whether to issue a decree signed off by all affected parties.[28] These requirements bear a superficial relationship to the obligations that Rule 23 imposes on a federal court when it is asked to settle, dismiss, or compromise claims certified for class treatment,[29] though the better comparison might be the discretion a district court uses when deciding whether to grant equitable relief.[30]

In all these respects—the elevation of a private settlement to a judicial order; the power to impose judicially administered relief that extends beyond what adjudication could produce coupled with constraints on the terms of the decree that would not apply to a purely private settlement; the capacity to preempt contrary state law where adjudicated remedies could not do so—a consent decree is an affirmative exercise of federal common lawmaking. The binding force of the decree arises not from background principles of state contract law but from the judicial powers of the federal courts. It is similar in this regard to the lawmaking power of a President to make Executive Agreements that have the capacity to extinguish claims held by private parties and supersede contrary state law.[31] The consent decree, like the Executive Agreement, has a long pedigree in the federal courts as an inherent power employed to resolve disputes, one that possesses preemptive capacity even when there has been no factual finding of wrongdoing and the decree will extend further than adjudicative remedies could.[32] Federal consent decrees are positive acts of

[28] *See, e.g.*, United States v. Metro. St. Louis Sewer Dist., 952 F.2d 1040, 1044 (8th Cir. 1992).

[29] *See* FED. R. CIV. P. 23(e) & (e)(2) ("The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. . . . If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate. . . .").

[30] In this connection, *cf.* Julian v. Cent. Tr. Co., 193 U.S. 93, 113–14 (1904) (describing "[a] bill filed to continue a former litigation in the same court" in order to "obtain and secure the fruits, benefits and advantages of the proceedings . . . or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court" as an "ancillary suit"), *noted with disapproval on other grounds*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378–79 (1994).

[31] *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

[32] *See, e.g.*, Swift & Co. v. United States, 276 U.S. 311, 327 (1928) (emphasizing "the legal implications of a consent decree" that need not be supported by findings of wrongdoing or violation of the law

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judicial lawmaking and the duties and obligations they impose are the product of federal common law.

II. JURISDICTION AND ENFORCEMENT IN CONSENT DECREES

My core assertion on the proper scope of jurisdiction in a new civil action brought to enforce a federal consent decree is that original jurisdiction exists where, but only where, the subject matter and the identity of the parties together indicate that federal common law must provide not only the source of the authority for the decree's binding effect but also the rule of decision that will govern in a dispute over the decree. I set forth that argument in Part III. Before reaching that issue, it is necessary to map out the relationship between three questions that can all have a bearing on the enforcement of consent decrees: (1) the question of ancillary jurisdiction, which has occupied the bulk of the federal courts' attention to matters of subject-matter jurisdiction in the enforcement of consent decrees; (2) the role of original jurisdiction as distinct from ancillary jurisdiction in enforcement actions; and (3) the frequently-stated proposition that one federal court will not employ contempt powers to enforce the injunction of another, a constraint that is sometimes—and usually erroneously—described as a constraint on subject-matter jurisdiction.

A. The Ancillary Jurisdiction Paradigm

The most common scenario for the enforcement of a federal consent decree arises when a party to the decree returns to the same court in which the original action was filed and asks the court to mandate compliance. The Court's primary statement on jurisdiction in this posture is *Kokkonen v. Guardian Life Insurance of America*.[33] *Kokkonen* involved a dispute over an insurance company's termination of its contractual arrangement with an insurance agent.[34] Plaintiff Kokkonen filed state-law claims in state court, Guardian removed to federal court based on diversity jurisdiction, and the parties settled their dispute on the eve of trial and obtained a voluntary dismissal pursuant to the provision in Federal Rule of Civil Procedure 41

underlying the dispute; rather "allegations of the bill not specifically denied [can] afford[] ample basis for a decree limited to future acts"); Nashville, Chattanooga & Saint Louis R.R. Co. v. United States, 113 U.S. 261, 266 (1886) (explaining the well-established rule that "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.").

[33] Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375 (1994).

[34] *Id.* at 376.

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for dismissal upon "stipulation . . . signed by all parties."[35] The parties neither presented their settlement as a consent decree nor asked the district court to incorporate their agreement into its order of dismissal, and the court did not indicate it was retaining jurisdiction to hear and resolve any disputes under the agreement.[36] Following the dismissal, Guardian believed that Kokkonen was not satisfying his obligations under the settlement and returned to the district judge with a motion seeking enforcement.[37] Guardian did not file a new civil action on the settlement; rather, its motion purported to rely on the jurisdiction of the initial action.[38] As the case came before the Supreme Court, the question presented was whether the district judge had ancillary jurisdiction to entertain Guardian's enforcement request.[39] The Court concluded the answer was no.[40]

Although *Kokkonen* rejected jurisdiction on the facts before it and is sometimes cited as a restrictive ruling,[41] in fact it frames a broad scope for the availability of ancillary jurisdiction over the enforcement of federal consent decrees. The Court explained that ancillary jurisdiction was lacking in that case because the settlement agreement had never been formally transformed into a consent decree.[42] Rather, Guardian argued that a mere "breach of a contract, part of the consideration for which was dismissal of an earlier federal suit" was sufficient to establish ancillary jurisdiction over a motion to secure federal enforcement of the contract.[43] The Court rejected that position, emphasizing the importance of the formal step of elevating a settlement agreement to the status of a consent decree before ancillary jurisdiction can attach. On this point, the Court held, "The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order."[44]

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[35] FED. R. CIV. P. 41(a)(1)(A)(ii).

[36] *Kokkonen*, 511 U.S. at 377–78.

[37] *Id.* at 375.

[38] *Id.*

[39] *Id.* at 379.

[40] *Id.* at 381.

[41] *Id.* at 375.

[42] *Id.* at 379–80.

[43] *Id.* at 381.

[44] *Id.*

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Less often discussed is *Kokkonen*'s expansive treatment of the option to bring a consent decree into existence provided that the parties and the court observe the necessary formalities. On this issue, the Court appears to assume that the parties and the district court have a free hand to invoke that option if they choose:

> The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. That, however, was not the case here.[45]

The holding in *Kokkonen* is a gatekeeping statement making clear that a party cannot unilaterally invoke ancillary federal jurisdiction to enforce the settlement of a federal lawsuit if the parties and the court have not agreed to make that option available. At the same time, the Court treats the counterfactual situation in which the parties and the court do make provision for such enforcement as *per se* adequate to support an exercise of ancillary jurisdiction and, apparently, freely available so long as the appropriate formalities are followed. This presumptive availability of ancillary jurisdiction to enforce a decree appears equally available in a state-law case that initially came into federal court based only on diversity, the circumstance presented in *Kokkonen*. So understood, *Kokkonen* is a sweeping statement on the ability of the parties and the judge to expand by fiat a district court's ancillary jurisdiction to enforce settlement agreements.

B. The Original Jurisdiction Paradigm

The other common scenario in which parties seek to enforce a settlement of a prior federal lawsuit arises when the party seeking enforcement initiates a new civil action, often in a federal district court different from the one that heard the original dispute. In such a case, if ancillary jurisdiction is not available, the district court must have some basis for exercising original jurisdiction over the newly-filed action. In the absence of complete diversity or some other ground for jurisdiction based on the identity of the parties, the primary question in such cases is whether a claim arising under the federal consent decree can support federal question jurisdiction.

[45] *Id.*

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The Supreme Court has not squarely addressed this question. *Kokkonen* holds that a settlement of an earlier federal lawsuit that does not create a consent decree also does not provide ancillary jurisdiction for a subsequent enforcement action brought to the original court. That holding could imply that a newly-filed action for "breach of a contract, part of the consideration for which was dismissal of an earlier federal suit[,]"[46] likewise does not fall within the second court's original jurisdiction on that basis alone. The converse, however, may not hold true. When the original action was resolved through the creation of a consent decree, *Kokkonen*'s near-automatic extension of ancillary authority over subsequent enforcement actions brought to an issuing court that has "retained jurisdiction" does not necessarily imply anything about the power to exercise original jurisdiction over a newly-filed action. Ancillary jurisdiction and original jurisdiction are separate and mutually independent analytical issues.

Lower federal courts appear to have universally rejected the suggestion that new lawsuits filed to enforce federal consent decrees and stipulated judgments automatically satisfy original federal question jurisdiction and they have been correct to do so, though most have not provided any comprehensive analytical framework on the matter.[47] That proposition is often taken to flow of necessity from the long-

[46] *Id.*

[47] A decision of the Fourth Circuit provides a typical example of the standard account of the issue:

> It is widely accepted that institution of a second action on a judgment is a valid method of enforcing that judgment. Moreover, the second action does not have to be filed in the same district court that rendered the judgment in the first action. Therefore, the district court that rendered the judgment in the first action does not have exclusive jurisdiction over the enforcement of that judgment. If the district court hearing the second action has subject matter and personal jurisdiction, the action is properly before the second court. The only instance in which a subject matter jurisdiction problem arises in the second action is where the first action was based on federal question jurisdiction [and the federal nature of the judgment is the sole basis for subject-matter jurisdiction offered in the second action]. In the present case, the problem that arises when the first action is based on federal question jurisdiction is not present because in the case at hand there is diversity jurisdiction for the instant case filed in the Eastern District of Virginia. Therefore, the district court in the present case had subject matter diversity of citizenship jurisdiction.

Anita's N.M. Style Mexican Foods, Inc. v. Anita's Mexican Foods Corp., 201 F.3d 314, 317 (4th Cir. 2000) (citations omitted).

The exception is *E.O.C.H.*, which provides a more fully realized account of the grounds for original jurisdiction over the specific type of consent decree it confronted and for which the argument for federal question jurisdiction was at its apex: a decree that binds the United States government and its agents and

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established rule that "a suit on a judgment does not involve a federal question, however important federal questions may have been to the resolution of the original controversy."[48] The issue has come up most frequently when parties to a consent decree seek enforcement in a district court different from the one that issued the decree,[49] which is no surprise given the clear path available for ancillary jurisdiction in the issuing court when the parties and court have provided for it. Litigants do sometimes bring newly-filed enforcement actions in the originating court, as well, and when they do the question of original jurisdiction is equally salient.[50]

C. The Contempt Enforcement Paradigm

Insofar as a litigant seeks to remedy a violation of a court's injunction through a contempt sanction, there is broad agreement that the litigant must seek that remedy from the court that issued the injunction. That principle holds equally true of the injunctive components of a consent decree. The mandate of a federal court's injunction runs throughout the United States and hence requires no registration or other special action to have binding effect outside the district whence it issued.[51] Likewise, a party to the injunction seeking contempt sanctions need not establish personal jurisdiction over their opponent anew based on the actions giving rise to the contempt request, even if the actions claimed to warrant sanction have no immediate connection to the issuing district.[52] Jurisdiction over the person in a contempt proceeding flows from the original action and a federal court that issues an injunction always has power to enforce the injunction against the parties bound by the judgment.[53] As the Second Circuit put the matter in *Stiller*: "Violation of an injunctive order is cognizable in the court which issued the injunction, regardless of

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defines their continuing duties on matters of inherent and exclusive federal concern. E.O.C.H. v. Sec'y U.S. Dep't of Homeland Sec., 950 F.3d 177 (3d Cir. 2020).

[48] Stiller v. Hardman, 324 F.2d 626, 628 (2d Cir. 1963) (citing 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § P1.04(2), at 28 n.20 (2d ed. 1962)).

[49] *See, e.g.*, United States v. Fisher, 864 F.2d 434, 436–37 (7th Cir. 1988) (consent decree issued in the Northern District of Indiana and subsequent suit based on the decree filed in the Northern District of Illinois).

[50] *See* Waste Mgmt. of Ohio, Inc. v. City of Dayton, 132 F.3d 1142 (6th Cir. 1997); N.A.A.C.P. v. Donovan, No. CIV.A.78-850, 2009 WL 792301 (D. Mass. Mar. 17, 2009).

[51] *See* Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 451–52 (1932) (showing an injunction issued by a federal district court is "binding upon the [parties], not simply within the District [that issued the decree], but throughout the United States").

[52] *Id.* at 451.

[53] *See id.*

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where the violation occurred."[54] The same generally holds true with respect to nonparties to the original suit who take actions aimed at undermining or thwarting the injunction.[55] Absent extraordinary circumstances, the issuing court will always have the power to enforce contempt sanctions against its judgments.

That power to enforce an injunction or judicial order through contempt is generally understood to reside exclusively with the issuing court.[56] As the Supreme Court explained in *In re Debs*, "the power of a court to make an order carries with it the equal power to punish for disobedience of that order" and the presumption is that the court itself "must have the right to inquire whether there has been any disobedience thereof" because the submission of that question "to another tribunal . . . would operate to deprive the [original] proceeding of half its efficiency."[57] *Debs* presented the question whether a party accused of a criminal contempt enjoys a right to a jury trial in the ensuing prosecution and the Court's negative holding on that issue has since been largely overruled by a more expansive account of the Sixth Amendment.[58] But the proposition that the issuing court must retain an exclusive prerogative as against other courts to enforce contempt of its own orders and injunctions has remained an accepted part of the doctrine of remedies among lower federal courts.[59]

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[54] *Stiller*, 324 F.2d at 628.

[55] *See, e.g.*, Waffenschmidt v. MacKay, 763 F.2d 711, 714 (5th Cir. 1985) ("Nonparties who reside outside the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order."). *But see* Reebok Int'l v. McLaughlin, 49 F.3d 1387, 1391–92 (9th Cir. 1995) (accepting this proposition as a guiding principle in domestic cases but declining to extend it extraterritorially "in an attempt to impose conflicting duties on another country's nationals within its own borders").

[56] *In re* Debs, 158 U.S. 564, 594–95 (1895), *overruled on other grounds by* Bloom v. Illinois, 391 U.S. 194 (1968).

[57] *Id.*

[58] *See* Bloom v. Illinois, 391 U.S. 194, 198 (1968) ("Our deliberations have convinced us . . . that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial.").

[59] *See, e.g.*, Alderwoods Grp. v. Garcia, 682 F.3d 958, 970 (11th Cir. 2012) ("[T]he court that issued the injunctive order alone possesses the power to enforce compliance with and punish contempt of that order."); Bedel v. Thompson, 956 F.2d 1164, *4 (6th Cir. 1992) ("Enforcement of the injunction through a contempt proceeding must occur in the issuing jurisdiction because contempt is an affront to the court issuing the order."); Waffenschmidt v. MacKay, 763 F.2d 711, 716–17 (5th Cir. 1985) ("Enforcement of

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Some courts have framed this limitation as a constraint on the subject-matter jurisdiction of federal district courts other than the one that issued the original injunction.[60] That proposition often rests on imprecise thinking,[61] however, and it operates in tension with the statutes defining original subject-matter jurisdiction, which indicate that the authority they extend is possessed by "[t]he district courts" (meaning all of them).[62] Tellingly, in *Baker v. General Motors*—a case in which the issue of constraints on the power of one court to bind another were the centerpiece of the analysis—the Supreme Court acknowledged in dictum that one district court does not ordinarily employ the contempt power to enforce violations of an injunction issued by another but described that proposition as a generally-accepted practice rather than an always-applicable command or a jurisdictional constraint.[63] The argument for framing this enforcement limitation as jurisdictional in nature may be stronger in an *in rem* proceeding, for example in bankruptcy, where exclusive power over the property that is the subject of the proceeding has been treated as a necessary condition for a properly constituted tribunal.[64] In an *in personam* dispute, however,

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an injunction through a contempt proceeding must occur in the issuing jurisdiction because contempt is an affront to the court issuing the order.").

[60] *See, e.g.*, Klett v. Pim, 965 F.2d 587, 590–91 (8th Cir. 1992) (dismissing action to enforce injunction through contempt "for lack of subject matter jurisdiction" because it was brought in a federal district court other than the one that issued the injunction).

[61] *Klett* relies on the language of 18 U.S.C. § 401 and its codification of the authority of a district court to use the contempt power to enforce "its authority, *and none other*" against "[d]isobedience or resistance." *See Klett*, 965 F.2d at 590–91. § 401 says nothing about subject-matter jurisdiction, however, and its broad reference to a district court enforcing "its authority, and none other," first introduced into the U.S. Code as part of the broad restructuring of the federal courts in 1948, would seem to encompass a range of scenarios including a constraint on the use of contempt sanctions to enforce the authority of state courts or administrative tribunals. § 401 may be capacious enough to include a statutory constraint on the use of contempt by one district court to enforce the injunction of another, but there is no warrant in the statute for framing that constraint as a limitation on subject-matter jurisdiction.

[62] *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

[63] *See* Baker v. Gen. Motors, Corp., 522 U.S. 222, 236 (1998) ("Sanctions for violations of an injunction, in any event, are generally administered by the court that issued the injunction."); *see also*, *e.g.*, Tennessee v. Surety Bank, N.A., 84 F. Supp. 2d 803 (N.D. Tex. 1998) ("The defendants made the forceful argument that this court lacks jurisdiction to enforce the Tennessee orders, because suits for violation of injunctions can only be brought in the court that issued the original injunction. While I decline to rule on the issue of whether this court lacks jurisdiction to enforce another court's injunction, I note that the Supreme Court has recognized that sanctions for a violation of an injunction 'are generally administered by the court that issued the injunction.'") (quoting *Baker*) (first citation omitted).

[64] *See, e.g.*, Alderwoods Grp. v. Garcia, 682 F.3d at 969 ("The jurisdiction of courts adjudicating rights in the bankrupt estate included the power to issue compulsory orders to facilitate the administration and

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the use of jurisdictional language to describe limitations on the role of one district court in using contempt to enforce the injunction of another appears to be an unwarranted practice with little doctrinal foundation.[65]

This analysis highlights another distinction of key importance here: the difference between the scope of a district court's original jurisdiction to entertain a newly-filed action to enforce the contractual elements of a consent decree and the enforcement of an existing injunction or judicial order through contempt. When we say that a consent decree has aspects of both a contract and a judicial order, that is not an abstract ontological statement but a practical description with concrete implications. Once a consent decree issues, some of the obligations it imposes on the parties are contractual in both form and operation whereas others are embodied in specific judicial orders that have the effect of an injunction.[66] Insofar as a party to a consent decree seeks to enforce the terms of a judicial order through the contempt power, the federal system instructs that party to return to the court that issued the order because "the contempt is an affront to the court issuing the order."[67] It is not necessary and may cause confusion to insist on describing that limitation as a constraint on subject-matter jurisdiction; it suffices to say that it represents the clear consensus as a matter of federal remedies doctrine. In contrast, insofar as a party seeks to hold its opponent to the ongoing, executory contractual obligations it has undertaken in a consent decree—obligations that have not yet been made the subject of a specific judicial order and as to which a contempt proceeding would not yet be available—there is no reason either in subject-matter jurisdiction or remedies law why such an action must be brought before the issuing tribunal. It is an action on a

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distribution of the res. A court, however, must have possession of the res in order to obtain *in rem* jurisdiction over its distribution.") (alteration in original) (citations omitted). Whether and when the requirements of an *in rem* proceeding are properly characterized as going to the subject-matter jurisdiction of a federal court in settings such as bankruptcy and admiralty is a complex matter that lies outside the scope of this analysis. *See, e.g.*, Leopard Marine & Trading, Ltd. v. Easy Street, Ltd., 896 F.3d 174, 187 (2d Cir. 2018) (noting "the unusual position that actions *in rem* occupy within admiralty jurisdiction" where "*in rem* jurisdiction is sometimes necessary to establish subject matter jurisdiction in admiralty").

[65] *Cf.* Arbaugh v. Y & H Corp., 546 U.S. 500, 510 (2006) ("'Jurisdiction,' this Court has observed, 'is a word of many, too many, meanings.' This Court, no less than other courts, has sometimes been profligate in its use of the term.") (*citing* Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 90 (1998) (internal quotation marks omitted)); 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[1], p. 12–36.1 (3d ed. 2005) ("Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief—a merits-related determination.").

[66] *See* Mengler, *supra* note 17, at 294–95.

[67] Bedel v. Thompson, 956 F.2d 1164, at *4 (6th Cir. 1992).

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contract and can be brought in any district court with original jurisdiction over the newly-filed suit, subject only to the requirements of personal jurisdiction and venue.

Of course, the consent decree itself might specify that subsequent enforcement actions may only be heard before the issuing court. As Part IV explains, such constraints constitute rules of forum selection and will ordinarily be enforceable as a constraint on venue. But if the consent decree does not impose such a limitation—or if the decree expressly authorizes subsequent enforcement actions to be brought in other federal districts, as was the case in the *Flores* settlement—then a new action on the contractual obligations in the decree can be brought in any district court, provided that the court has an independent basis for original subject-matter jurisdiction and personal jurisdiction and venue are satisfied.

III. FEDERAL-QUESTION JURISDICTION AND FEDERAL CONSENT DECREES

Having clarified the respective roles of original jurisdiction, ancillary jurisdiction, a suit to enforce executory contractual obligations, and the use of the contempt power to enforce the self-executing demands of an injunction under a consent decree, it is possible to frame with greater precision the question that is the primary subject of this Article: when does a district court have original subject-matter jurisdiction to entertain a subsequently-filed action that seeks to enforce the executory contractual obligations of a federal consent decree? A proper answer to that question requires careful attention to the difference between the source of the right sought to be enforced in a suit of this kind and the source of the rule that will govern the adjudication of that right.

The source of the right in a claim to enforce a federal consent decree is federal common law. As Part I explains, consent decrees are positive acts of federal judicial lawmaking and the duties and obligations they impose are the product of federal judicial authority. That being so, upon first examination, there would appear to be a clear path for federal-question jurisdiction in such cases. When federal law is the source of the right to be enforced, the conventional wisdom is that original jurisdiction is readily available. The *American Well Works* rule advises that "[a] suit arises under the law that creates the cause of action,"[68] and while the Court has not adopted Justice Holmes's formulation as the exclusive means to establish federal-question jurisdiction, it continues to treat the Holmes rule as a presumptively

[68] Am. Well Works Co. v. Layne Bowler Co., 241 U.S. 257, 260 (1916).

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adequate "rule of inclusion . . . [that] admits of only extremely rare exceptions."[69] A cause of action that arises under substantive federal common law appears to sit squarely under the umbrella of *American Well Works*. As *Illinois v. City of Milwaukee* instructs, federal-question jurisdiction under 28 U.S.C. § 1331 "will support claims founded upon federal common law as well as those of a statutory origin."[70] In the leap from *American Well Works* to *Illinois v. Milwaukee*, however, the admonition that exceptions to the presumptive rule will be "extremely rare" loses some of its force.

The standard citation for the rare exception in statutory cases is *Shoshone Mining Company v. Rutter*.[71] *Shoshone Mining* involved a cause of action created by federal statute to determine ownership in certain mining rights.[72] Despite the federal source of the cause of action, the Court found that the statute left the rights of the adverse parties to be determined by "local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."[73] In the Court's view, this language indicated that Congress's "recognition . . . of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal law,"[74] meaning that claims under the statute would be governed wholly by the "determination of the meaning and effect of certain local rules and customs prescribed by the miners of the district, or the effect of state statutes."[75] From this, the Court concluded, "it would seem to follow that [a claim brought under the federal statute] is not one which necessarily arises under the Constitution and laws of the United States"[76] and hence that federal-question jurisdiction was lacking. In the modern doctrine, one might describe *Shoshone* as a case that lacks "a stated federal

[69] Gunn v. Minton, 568 U.S. 251, 257 (2013).

[70] Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972). *See also id.* at 99 (approving the proposition that "'laws,' within the meaning of § 1331(a), embraced claims founded on federal common law").

[71] Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900).

[72] *Id.*

[73] *Id.* at 508.

[74] *Id.*

[75] *Id.* at 510.

[76] *Id.* at 509.

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issue, actually disputed and substantial,"[77] though that terminology is designed for cases in which state law was the source of the right being enforced. Few federal statutory causes of action lack a federal rule of decision and advert wholly to state law in this fashion when defining rights and obligations: hence the "extremely rare" operation of *Shoshone Mining* in statutory cases.[78]

The same does not hold true in cases governed by federal common law. In that setting, the relationship between federal law serving as the source of a right and federal law providing the rule of decision is much less tight. An example with obvious relevance to the present inquiry may be found in the Court's holding in *Semtek International v. Lockheed Martin* regarding the binding effect of federal judgments.[79] After letting the matter go unspecified for two centuries,[80] the Court explained in *Semtek* that federal common law is the source of authority that renders federal judgments binding on parties and enforceable in state courts.[81] At the same time, it held that a state rule of decision would ordinarily apply to judgments issued in diversity cases to determine what law of preclusion will define the judgment's effect.[82] The policy of the diversity statute to avoid inequitable administration of the laws as between diverse and non-diverse litigants[83] coupled with the lack of a distinctive federal interest for applying a federal rule in most such cases counseled the incorporation of a state rule of decision for determining the content of the rights in the judgment. A federal rule of decision would be required and the "federal reference to state law [would] not obtain" only "in situations in which . . . state law is incompatible with federal interests"—as, for example, if state preclusion law would not enforce consequences for discovery misconduct in the diversity suit and a

[77] Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005); *see also* Gunn v. Minton, 568 U.S. 251, 262 (2013) (discussing the requirement for a substantial federal interest in a federal-question case).

[78] *See, e.g.*, DuBerry v. D.C., 824 F.3d 1046, 1056 (D.C. Cir. 2016) (distinguishing *Shoshone Mining* on the grounds that there was "no question of rights under D.C. law" at issue).

[79] Semtek Int'l v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001).

[80] *See generally* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986) [hereinafter Burbank, *Interjurisdictional Preclusion*] (setting forth the analytical framework that served as the precursor to *Semtek*).

[81] *Semtek*, 531 U.S. at 509.

[82] *Id.* at 508–09.

[83] *See, e.g.*, Guaranty Tr. Co. v. York, 326 U.S. 99, 108–09 (1937).

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federal rule was necessary to protect the integrity of the proceedings in the rendering court.[84]

This kind of wholesale incorporation of a state rule of decision to govern the substantive content of a federal claim, though rare in statutory causes of action, occupies a significant place in the landscape of federal common law. The Court explored this paradigm over a series of rulings following its decision in *Erie*, whose extirpation of the general federal common law prompted a comprehensive reexamination of the source of the right and the source of the rule in cases implicating federal authority where such analytical precision had been lacking under *Swift v. Tyson*.[85] As I have explained at greater length elsewhere,[86] it took the Court some time following *Erie* to develop a coherent analytical approach to these questions in the various types of cases that call for the application of federal common law, and in the early years that effort was characterized by reticence over the possibility of destabilizing doctrines that implicated important federal interests.[87] Even as the Court began to offer more meaningful guidance about the role of federal common law in creating causes of action and imposing preemptive liability and regulatory rules, it "also went out of its way to inflect that power with the federalism principles to which *Erie* had given voice."[88]

In *Board of Commissioners of Jackson County v. United States*, for example, the Court decided a dispute over the availability of interest on a refund of taxes that had been improperly levied on a member of the Pottawatomie Nation.[89] The cause of action to recover the taxes arose by implication from a treaty executed between the United States and the Pottawatomie, so the right was necessarily federal in character.[90] But the Court found that the question whether interest was available, though appurtenant to a federal right, was not inherently federal in character and did

[84] *Semtek*, 531 U.S. at 509.

[85] Wolff, *Choice of Law and Jurisdictional Policy*, *supra* note 8, at 1851–53.

[86] *See id.* at 1851–78.

[87] *See, e.g.*, United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942); Wolff, *Choice of Law and Jurisdictional Policy*, *supra* note 8, at 1859–60 (describing the Court's failure to specify the source of the rule in a dispute involving a major wartime contract to which the United States was a party).

[88] Wolff, *Choice of Law and Jurisdictional Policy*, *supra* note 8, at 1869.

[89] 308 U.S. 343 (1939).

[90] *Id.* at 348.

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not strongly implicate federal interests.[91] The Court thus found it appropriate to craft a rule that gave "due regard for local institutions and local interests."[92] Those considerations led the Court to adopt a state-law rule on the question of interest.[93] The source of the right to interest on the improperly collected taxes was still federal, the Court emphasized, but the rule of decision for determining the availability of interest in a given case would proceed from state law: "With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy."[94] When the Court ruled in *Clearfield Trust*[95] four years later that a preemptive federal rule of decision was necessary to enforce the rights of the United States government in its contracts and commercial paper, that decision spoke "in dialogue with rulings like *Jackson County*" when describing the nature of the federal interest in the case and "rejected the proposal to 'absorb' state law as a governing federal standard."[96]

When a party to a federal consent decree files an independent action to enforce the contractual terms of the decree, the suit operates under this same analytical framework. The rights created by the consent decree have their source in federal common law. However, whether a federal rule of decision will govern the interpretation and application of the decree or instead will absorb "state law . . . as

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[91] *Id.* at 349–50.

[92] *Id.* at 351.

[93] *Id.* at 351–52.

[94] *Id.*

[95] Clearfield Tr. Co. v. United States, 318 U.S. 363 (1943).

[96] Wolff, *Choice of Law and Jurisdictional Policy*, *supra* note 8, at 1870. The relevant passage of *Clearfield Trust* explains:

> In our choice of the applicable federal rule we have occasionally selected state law. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. . . . The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. . . . The desirability of a uniform rule is plain. And while the federal law merchant developed for about a century under the regime of [*Swift*], represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

Clearfield Tr., 318 U.S. at 367 (internal references omitted).

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the governing federal rule"[97] depends on whether the decree implicates federal interests sufficient to call for a distinctively federal standard. That question, in turn, will often determine whether there is original jurisdiction over the action under the federal-question statute or instead whether the *Shoshone Mining* principle will operate to foreclose that avenue for bringing the suit into a federal court.[98]

Some types of federal consent decree present an overwhelming case for a federal rule of decision and hence federal-question jurisdiction in a subsequently filed case. Others require more analysis of competing considerations but still present a strong case for a categorical rule supporting federal-question jurisdiction. And in some cases, it is only the federal character of the consent decree itself that offers support for a federal question in a subsequently filed enforcement action, presenting the least convincing argument for original jurisdiction.

A. The Strongest Federal Interest Cases

The most compelling case for federal-question jurisdiction in a newly-filed action to enforce a consent decree is to be found in a suit where the United States government is a party to the decree and the issues involve matters of an inherently federal character or touch on core areas of federal concern. These were the circumstances presented to the Third Circuit in *E.O.C.H.*, a suit involving enforcement of the *Flores* settlement by a seven-year-old girl who came to the United States with her father from Guatemala seeking asylum from religious persecution.[99] The *Flores* decree binds the U.S. government and its agents and concerns an area of law where the United States claims plenary and exclusive authority: the arrival of people at the U.S. border, the enforcement of immigration laws, the adjudication of asylum claims, and the detention of some of those immigrants and asylum seekers by or on behalf of the U.S. government.[100] It is difficult to imagine a set of circumstances that would more clearly require a federal rule of decision under

[97] *Bd. of Comm'rs.*, 308 U.S. at 351–52.

[98] Diversity jurisdiction would also be available if the requirements of 28 U.S.C. § 1332 were satisfied, as would any other independent basis for original jurisdiction. Nothing about an action to enforce the contractual obligations of a federal consent decree would prevent the normal operation of other jurisdictional statutes. *See, e.g.*, Bartlett v. Honeywell Int'l, 737 Fed. Appx. 543, 547 (2d Cir. 2018) (explaining that a federal district court hearing a newly-filed action to enforce a federal consent decree can exercise jurisdiction based on diversity as an alternative to federal-question jurisdiction based on the decree).

[99] E.O.C.H. v. Sec'y U.S. Dep't of Homeland Sec., 950 F.3d 177 (3d Cir. 2020).

[100] *Flores* Consent Decree, *supra* note 1, ¶ 9.

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Clearfield Trust and its progeny and demand that a federal tribunal have the power to hear enforcement claims.[101]

When the U.S. government is a party to the consent decree but the issues addressed do not touch on areas of surpassing federal concern like the questions of national sovereignty involved in *E.O.H.C.*, the case for a federal rule of decision and federal-question jurisdiction may be less overwhelming but nonetheless remains strong. *Clearfield Trust* itself involved an ordinary question of the defenses available to an enforcement claim on commercial paper, but the fact that the paper in question was issued by the United States led the Court to view the dispute in systemic terms, emphasizing the harm that might result if "the rights and duties of the United States" were subject to "exceptional uncertainty" because of differing and unpredictable state-law standards, leading the Court to conclude that "[t]he desirability of a uniform rule is plain."[102] Any consent decree binding the United States and its agents that operates in a national or systemic fashion would implicate a similar federal interest in uniformity.[103]

If a consent decree to which the United States is a party were to operate in an entirely local fashion and did not otherwise touch on the administration of national programs or other matters implicating the operations of the U.S. government, one could attempt to craft an argument that federal common law should incorporate state law as a rule of decision. Although the Court has sometimes indicated in unqualified language that "obligations to and rights of the United States under its contracts are governed exclusively by federal law,"[104] the Court often does not devote separate

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[101] In *United States v. Standard Oil*, the Court applied *Clearfield Tr.* to a tort claim brought by the U.S. government to recover funds it expended on medical care in the treatment of a soldier hit by a car. United States v. Standard Oil, 332 U.S. 301 (1947). As the Court explained:

> Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.

Id. at 305–06.

[102] Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943).

[103] *See Standard Oil*, 332 U.S. at 307 (explaining that a uniform federal rule is needed in "matters . . . so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings").

[104] Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

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attention to the question whether and when federal common law should adopt state law by reference. However, the majority view among lower federal courts appears to be that every consent decree to which the United States is a party is not just binding as federal common law but also must be governed by a federal rule of decision without regard to the specific nature of the issues presented.[105] The Third Circuit's analysis in *E.O.H.C.* was unqualified on this point, for example, holding without further elaboration that a federal rule of decision governs a federal consent decree when the United States is a party.[106]

Moreover, even if one posits a case in which a decree involving the United States as a party might be governed by a state rule of decision, the case for original jurisdiction over a subsequent enforcement action on the decree is still strong. Federal jurisdiction always exists when the United States sues as a plaintiff,[107] and the amenability of the United States to suit as a defendant always depends on its willingness to waive sovereign immunity, meaning as a practical matter that the United States can always decline to be sued in any tribunal other than a federal court. Targeted jurisdictional statutes involving the U.S. government as a defendant, some of which might be directly applicable in an action to enforce a consent decree, draw this connection between sovereign immunity and subject-matter jurisdiction and make a strong case for presuming that national interests are at stake whenever the

[105] *See, e.g.*, Almond v. Cap. Props., 212 F.3d 20, 22 (1st Cir. 2000) (describing as the "correct position" the proposition that any suit that "necessarily presents and turns upon the interpretation of a contractual obligation to the United States" is governed by a federal rule of decision and hence presents a federal question); Gov't of Guam v. United States, 341 F. Supp. 3d 74, 86 (D.D.C. 2018) ("Moreover, contracts to which the United States is a party must be interpreted according to the precepts of federal common law. Therefore, a consent decree between the federal government and another party must also be interpreted in light of the federal common law of contracts.") (citations omitted); United States v. Volvo Powertrain Corp., 854 F. Supp. 2d 60, 64 n.1 (D.D.C. 2012) (citations omitted); United States v. Witco Corp., 76 F. Supp. 2d 519, 530 (D. Del. 1999) (applying federal common law to a consent decree to which the United States. was a party); United States v. Krilich, 948 F. Supp. 719, 730 (N.D. Ill. 1996) (same). There are occasional exceptions where federal courts apply state contract doctrine in this setting. *See, e.g.*, United States v. City of Northlake, 942 F.2d 1164, 1167 (7th Cir. 1991) (involving the construction of a consent decree resolving federal law claims in a suit brought by the federal government, holding that "fundamental principles of contract interpretation under relevant state law apply when a court is presented with the task of interpreting the provisions of a consent decree").

[106] E.O.C.H. v. Sec'y U.S. Dep't of Homeland Sec., 950 F.3d 177, 193 ("The United States is a party to this contract, so federal common law governs.").

[107] *See* 28 U.S.C. § 1345 ("Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.").

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U.S. government is a litigant.[108] Thus, the better rule is that original jurisdiction under the federal-question statute is always available in an action filed to enforce a consent decree that binds the United States and its agents and involves the United States as a party.

The Supreme Court has held that the *Clearfield Trust* doctrine does not necessarily apply to claims brought by private parties in the posture of third-party beneficiaries to a contract that binds the United States. In *Miree v. DeKalb County*, the Court indicated that a case-by-case analysis was called for when determining the role of federal common law in that setting and held in the case before it that state law governed the claims of injured plaintiffs seeking to enforce obligations contained in a contract between DeKalb County and the Federal Aviation Administration.[109] The Solicitor General had indicated in the case that the interests of the United States "would not be directly affected by the resolution of these issue[s][,]"[110] and the Court found no reason to conclude that the operations of the United States "would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts."[111] It therefore found *Clearfield Trust* inapplicable and applied Georgia law to the question of third-party liability.[112] In a case involving a consent decree that binds the United States, if a private party were able to bring suit against a non-U.S. entity and assert claims as a third-party beneficiary to the decree, *Miree* would require a case-specific showing that federal interests are implicated in the dispute in order to warrant the application of a federal rule of decision. Failing that showing, the case for federal-question jurisdiction over the claim in such a case would fall into the category of weak federal interests discussed below.

Several statements by the Court appear to indicate that consent decrees are never enforceable by third-party beneficiaries, even if the applicable contract law

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[108] *See* The Little Tucker Act, 28 U.S.C. § 1346(a)(2) (waiving U.S. sovereign immunity and authorizing original jurisdiction in any action for damages against the United States "not exceeding $10,000 in amount, founded . . . upon any express or implied contract"); 28 U.S.C. § 1491(a)(1) (granting original jurisdiction to the U.S. Court of Federal Claims for "any claim against the United States founded . . . upon any express or implied contract with the United States").

[109] Miree v. DeKalb Cnty., 433 U.S. 25 (1977).

[110] *Id.* at 29–30 (alteration in original).

[111] *Id.* at 30.

[112] *Id.* at 28–29.

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would permit such a claim, so this scenario might not arise.[113] It is unclear, however, whether the Court has drawn a careful distinction between the enforcement of consent decrees as judicial orders and the executory contractual obligations in a settlement when it has made these statements.[114] In an ordinary settlement agreement, of course, the third-party beneficiary doctrine operates as it would with any contract[115] and it is unclear why the same should not hold true when a settlement is incorporated into a judicial order. If the Court has in fact held that third-party beneficiary claims are categorically foreclosed when enforcing the contractual components of a federal consent decree, that result would be another illustration of the substantive federal common law fiber from which such decrees are woven.

B. Substantial Federal Interest Cases

A large number of federal consent decrees do not involve the U.S. government as a party but nonetheless implicate substantial federal interests. If the underlying suit that produced the decree was based on federal law, the decree will frequently involve the interpretation and application of federally-created duties. As Part I explains, the obligations imposed by a federal consent decree are not limited to those remedies that a court could have enforced in an adjudicated action. Those obligations can preempt contrary state law and they must be consistent with federal law, "com[e]

[113] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975) (noting "a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it") (citing United States v. Armour & Co., 402 U.S. 673 (1971); Buckeye Co. v. Hocking Valley Co., 269 U.S. 42 (1925)).

[114] In *United States v. Armour & Co.*, the only reference to third parties relates to the enforcement of a consent decree through the contempt power: "The Government does not contend that Greyhound's acquisition of controlling interest in Armour subjects Greyhound to punishment for contempt since it was not a party to the decree." 402 U.S. at 676–77. The bulk of the opinion relates to the proper interpretation of the contract provisions in the decree and the four-corners doctrine. And the holding of *Buckeye* rests on the conclusion that the complaining coal company was not, in fact, an intended beneficiary of the decree under consideration, not any statement about the categorical unavailability of the third-party beneficiary doctrine. Buckeye Co. v. Hocking Valley Co., 269 U.S. at 50. Finally, the holding in *Blue Chip Stamps* itself is based on a strict application of standing requirements for a federal securities claim and may not have broader application. *Blue Chip Stamps*, 421 U.S. at 731–49.

[115] *See, e.g.*, Perotti v. Corr. Corp. of Am., 290 P.3d 403, 408–09 (Alaska 2014) (holding that inmate in state facility is third-party beneficiary of agreement between Department of Corrections and company that operated detention facility); Delta Mech. v. Garden City Grp., 572 Fed. Appx. 554, 556 (9th Cir. 2012) (applying Missouri law to find that a plumbing company was a third-party beneficiary to a class-action settlement agreement between the manufacturers and the owners of defective water heaters).

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within the general scope of the case made by the pleadings,"[116] and "must further the objectives of the law upon which the complaint was based."[117] And, of course, the obligations imposed by a consent decree will sometimes make direct reference to the underlying federal law on which the suit was based. All these considerations make a strong case for a federal interest sufficient to warrant a federal rule of decision in the administration of the decree, and lower federal courts often assume that federal-question jurisdiction is available in an action brought to enforce the contractual obligations of a federal consent decree where the original action was based on federal law,[118] even though an action to enforce an ordinary federal-question judgment would not support the same result.[119]

Some consent decrees that are the product of a suit based on federal law will not present such a strong case for a federal rule of decision. Consider a case based on both federal and state claims where the decree resolves both sets of claims but is addressed primarily to duties arising under state law, or a decree resolving a suit based entirely on federal law but where the duties imposed by the decree are specific, limited, far removed from the construction or application of the underlying federal cause of action, and involve no preemption of contrary state law. If the question of original jurisdiction in a subsequent action to enforce the decree is to be measured case by case rather than categorically, the case for federal-question jurisdiction would be less compelling in such disputes.

My view is that a categorical approach is preferable and that consent decrees that resolve federal claims, in whole or in part, should be governed by a federal rule of decision and subject to federal-question jurisdiction in a subsequently filed enforcement action unless the underlying federal claims were "so patently without

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[116] Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (citing Pacific R.R. Co. v. Ketchum, 101 U.S. 289, 297 (1880)).

[117] Sansom Comm. v. Lynn, 735 F.2d 1535, 1537–38 (3d Cir. 1984) (applying *Ketchum* and holding that a district court has power to issue a consent decree in a federal question case even when the decree "incorporated essentially state law relief").

[118] *See, e.g.*, Bartlett v. Honeywell Int'l Inc., 737 Fed. App'x 543, 546 (2d Cir. 2018) (holding that federal-question jurisdiction is available in a subsequent case brought to enforce a federal consent decree based on the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 in which questions of CERCLA preemption under the decree may have to be adjudicated).

[119] *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 130.33 (3d ed. 2022) ("[I]f the judgment sought to be enforced was from an action in which federal question jurisdiction was the basis of federal court jurisdiction, an action solely to enforce the judgment would lack the federal question jurisdiction and therefore could not be maintained in federal court.").

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merit" as to be jurisdictionally deficient.[120] The case-by-case approach to federal-question jurisdiction that the Court employs in the absence of a federal cause of action creates notorious problems of uncertainty and malleability of administration.[121] That uncertainty may be a necessary cost to preserve access to a federal forum in cases based on state law where strong federal interests can only be accommodated by a flexible jurisdictional rule, but it seems less warranted in a case involving a federal consent decree where federal law provides both the source of the rights sought to be enforced and the jurisdiction for the underlying dispute that gave rise to the decree. This position does operate in tension with some lower federal court cases that apply state contract law to construe federal consent decrees involving federal claims, a doctrinal approach I think is probably incorrect.[122] Taking those cases as given and acknowledging that the matter is not free from doubt, my view remains that a somewhat over-inclusive categorical rule is warranted in this class of cases to eliminate needless unpredictability in the power of a subsequent federal court to entertain a newly-filed enforcement action on the consent decree.[123]

C. The Weak Federal Interest Case

On the far end of the spectrum, there are cases in which the federal consent decree was entered in a suit between private parties involving only state-law claims, the original suit was in federal court based only on diversity, and no specific federal interests are implicated beyond the source of the authority that makes the decree binding as law. This is the closest analog to the *Shoshone Mining* scenario in a suit to enforce a federal consent decree. When a party to the decree files a subsequent suit to enforce its contractual obligations in such a case, is the federal interest in ensuring the proper enforcement and construction of a consent decree issued by a

[120] Bell v. Hood, 327 U.S. 678, 683 (1946).

[121] *See, e.g.*, Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 316–20 (2005) (acknowledging the confusion in the doctrine introduced by *Merrell Dow*).

[122] *See, e.g.*, Holmes v. Godinez, 991 F.3d 775, 780 (7th Cir. 2021) (in case involving interpretation of a federal consent decree that resolved federal statutory and constitutional claims, holding that the decree must be "interpreted according to principles of state contract law"); Peery v. City of Miami, 977 F.3d 1061, 1069 (11th Cir. 2020) (in a case involving interpretation of a federal consent decree that resolved federal constitutional claims, holding the court must "follow rules for the interpretation of contracts and apply principles of state contract law").

[123] *But see* Racer Props. LLC v. Nat'l Grid USA, No. 5:18-CV-1267, 2022 WL 2577627, at *16–*17 (N.D.N.Y. July 8, 2022) (acknowledging that "state law claims that deal with a party's compliance with a CERCLA consent decree which may preempt certain state law tort claims sometimes gives rise to federal question jurisdiction" but finding "that is not the case here" because [t]he parties do not dispute plaintiffs' compliance with—or the reach of—any consent").

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federal court adequate to justify a federal rule of decision and hence to support federal-question jurisdiction over the newly-filed action? Some federal courts have suggested that the answer is yes,[124] but these suggestions often do not draw careful distinctions between different types of federal consent decrees and appear in cases where other considerations would militate in favor of a federal rule.[125]

The case for original federal jurisdiction in this category of cases is not compelling. I have not undertaken a comprehensive survey in conjunction with this Article, but the most common position among the lower federal courts appears to be that a state rule of decision governs the interpretation and enforcement of federal consent decrees that resolve disputes between private parties based on state law.[126] Assuming that is so, this class of cases appears to fall under the holding of *Shoshone Mining*: a cause of action based on a federally-created right that will nonetheless be decided by a state rule of decision and hence cannot satisfy federal-question jurisdiction.[127]

Strong support for that conclusion may be found in *Gully v. First National Bank*, which first introduced the question of whether a suit presents a truly substantial question of federal law for purposes of determining federal-question jurisdiction.[128] *Gully* involved a dispute regarding unpaid state taxes between two banks, one of which had assumed the liabilities of the other because of its insolvency.[129] The insolvent bank that owed the taxes was a national banking association that was amendable to state taxation only pursuant to a federal statute that waived the

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[124] *See, e.g.*, *In re* Harvey, 213 F.3d 318, 321–22 (7th Cir. 2000) (assuming in dictum that "the treatment of federal court consent decrees" is always governed by a federal rule of decision); United States v. Volvo Powertrain Corp., 854 F. Supp. 2d 60, 64 n.1 (D.D.C. 2012) ("A federal court interpreting its own consent decree applies the federal common law of contracts.").

[125] In *Volvo Powertrain*, for example, the court articulated this principle in broad, unqualified terms in a case where the United States was a party, meaning the broad principle was not necessary, and then cited to some precedents where the need for a federal rule of decision arose from a clearly established framework of substantive federal law. *See Volvo Powertrain*, 854 F. Supp. 2d at 64 n.1 (*citing* Kenamerican Resources v. Int'l Union, 99 F.3d 1161, 1164 n.2 (D.C. Cir. 1996) ("A federal court interpreting a collective bargaining agreement applies [the] federal common law of contracts.").

[126] *See, e.g.*, Frulla v. CRA Holdings, 543 F.3d 1247, 1252 (11th Cir. 2008) (in an action to enforce a federal consent decree resolving claims based on state law, holding that "[w]e interpret a consent decree as we would a contract, applying principles of Florida's general contract law"); Nephron Pharm. Corp. v. Hulsey, No. 618CV1573ORL31 2021 WL 1341879, at *6 (M.D. Fla., Jan. 12, 2021) (same).

[127] Shoshone Mining Co. v. Rutter, 177 U.S. 505, 509 (1900).

[128] Gully v. First Nat'l Bank, 299 U.S. 109, 111 (1936).

[129] *Id.*

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immunity it would otherwise have possessed.[130] The successor bank filed suit in state court asserting state law claims and the federally chartered bank removed to federal court, arguing that the suit arose under federal law because its amenability to state taxation was wholly dependent on federal authority.[131] Drawing on *Shoshone Mining* as one point of reference, the Supreme Court found this to be an inadequate basis for federal-question jurisdiction:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.[132]

While a federal consent decree involving private parties and the resolution of state law claims does "take[] its origin in the laws of the United States," a simple action to enforce the decree will not "really and substantially involve[] a dispute or controversy" of federal law in most cases.[133] If a particular enforcement action will present a serious question of federal law then original jurisdiction may be appropriate, but, as a categorical matter, there is no compelling reason to extend federal-question jurisdiction to this class of cases.

This conclusion seems all the more appropriate in light of the role that ancillary jurisdiction plays in the overall enforcement scheme for federal consent decrees. The parties and the district court in the original dispute always have the option to ensure the availability of a federal forum for the enforcement of a decree by providing that the issuing court will retain jurisdiction to hear enforcement actions.[134] As discussed in Part II, *Kokkonen* appears to make ancillary jurisdiction liberally available for that purpose even if the original action was based on state law and was in federal court based only on diversity.[135] The analysis in this Article addresses the important but distinct question of whether and when original jurisdiction is available in a newly-

[130] *Id.* at 112.

[131] *Id.*

[132] *Id.* at 114.

[133] *Id.*

[134] *See* Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375, 381–82.

[135] *Id.* at 380–81.

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filed action to enforce a federal consent decree. Even if the answer to that question is a restrictive one in some scenarios, the parties always retain the option to provide for federal enforcement of a consent decree in the issuing court through ancillary jurisdiction so long as the district court does not object.[136]

IV. VENUE AND ENFORCEMENT ACTIONS

An important question remains about the choice of district court in a newly-filed case to enforce a consent decree, assuming that original jurisdiction is available. In ordinary civil adjudication, we describe the allocation of suits among federal districts as a question of venue.[137] The rules of subject-matter jurisdiction determine whether the action can come into the system of federal courts at all;[138] the rules of venue determine the particular federal districts in which the action can proceed (along with the rules of personal jurisdiction where applicable).[139] The circumstances in which subject-matter jurisdiction, rather than venue, determine whether a particular federal district enjoys authority over a class of cases to the exclusion of others are exceptional.[140]

Consent decrees in which the issuing court expressly retains jurisdiction to hear subsequent enforcement actions, thereby actuating ancillary jurisdiction under *Kokkonen*, sometimes also provide that the rendering court will retain the

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[136] *See supra* Part II.A.

[137] *See* 28 U.S.C. § 1391(e)(1).

[138] *See id.* §§ 1331–1332.

[139] *See id.* § 1391; *see also supra* text accompanying notes 56–67.

[140] For one of those rare exceptions, see the Air Transportation Safety and System Stabilization Act, which created an exclusive and preemptive federal cause of action for first responders who suffered injury during the attacks of September 11, 2001, and consolidated all claims under that cause of action before the Southern District of New York, describing that allocation of claims in terms of subject-matter jurisdiction. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, § 408(b)(3), 115 Stat. 230, 241 (2001) (codified at 49 U.S.C. § 40101) ("The United District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim . . . resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.").

Courts have also used the language of subject-matter jurisdiction to describe the exclusive control that a bankruptcy court must exercise over the *res* of an estate in order to exercise universally binding authority to prioritize the claims of creditors and discharge debt. *See, e.g.*, *In re* Gucci, 309 B.R. 679, 682–83 (S.D.N.Y. 2004) (describing a bankruptcy court's power to exercise power over the *res* of a dispute as "its subject matter jurisdiction" and conflating the two categories throughout its analysis). Once again, whether and when this characterization is correct is a question that exceeds the scope of this analysis.

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"exclusive" prerogative to hear such actions.[141] Lower federal courts often interpret those caveats as a limitation on the subject-matter jurisdiction of other district courts, but that is incorrect. One district court cannot alter the original jurisdiction of another by fiat in such a fashion. Rather than divest other federal courts of subject-matter jurisdiction to entertain a subsequent enforcement action, a provision of this kind is a forum-selection instruction that establishes a rule of venue.

Forum-selection clauses are a staple in civil adjudication and are broadly enforceable in the federal courts. The *Bremen v. Zapata Off-Shore Company*[142] and *Carnival Cruise Lines v. Shute*[143] together establish that parties can select the federal venue in which their suit will be heard, whether in a fully negotiated agreement or a contract of adhesion, and their selection will be given effect subject only to a forgiving set of constraints that ask whether the venue chosen is "unreasonable"[144] or violates "fundamental fairness," arguments for which an objecting party bears a "heavy burden of proof."[145] When a consent decree reserves to the issuing court the exclusive prerogative to hear enforcement actions, it is against these forum-selection standards that the constraint should be measured. Exclusive enforcement provisions of this kind are aspects of the consent-decree-as-contract: forum-selection clauses that confer venue on the issuing court and render other courts improper fora in which to file the specified actions. They are broadly enforceable, but they have nothing to do with subject-matter jurisdiction.

Lower federal courts sometimes exhibit a lack of clarity on these matters, conflating the concepts of forum choice and subject-matter jurisdiction when they give effect to exclusive reservations of enforcement authority in the issuing court. Consider *Slaughter v. United States Department of Agriculture*, decided in 2014 by the Eleventh Circuit.[146] The plaintiff, *pro se* litigant Eddie Slaughter, filed a lawsuit in the Middle District of Georgia in which he alleged that the U.S. government had failed to satisfy its obligations under a consent decree issued in an earlier case,

[141] *See* United States v. Dist. Council of N.Y.C., No. 90 CIV. 5722, 2011 WL 5116583, at *3 (S.D.N.Y. Oct. 26, 2011); United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL—CIO, 905 F.2d 610, 613 (2d Cir. 1990).

[142] 407 U.S. 1 (1972).

[143] 499 U.S. 585 (1991).

[144] *Bremen*, 407 U.S. at 10.

[145] *Carnival Cruise Lines*, 499 U.S. at 595.

[146] Slaughter v. U.S. Dep't of Agric., 555 Fed. App'x 927 (2014) (per curiam).

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Pigford, where a class of Black farmers had brought federal claims against the USDA charging racial discrimination in the administration of federal credit and loan programs.[147] The *Pigford* decree set forth a remedial procedure that reserved enforcement exclusively to the issuing court, the District Court for the District of Columbia, and the Eleventh Circuit found that Slaughter was required to go to that tribunal to present his claims.[148] That holding was probably correct and should have been described as a straightforward application of the forum-selection clause and dispute-resolution mechanism provided for in the decree. Instead, the Eleventh Circuit framed its holding as one of subject-matter jurisdiction, pronouncing that the district court in Georgia "lacked subject matter jurisdiction over [the action] because it did not have an independent jurisdictional basis to enforce the *Pigford* Consent Decree"[149]—a remarkable proposition in an action brought against an agency of the United States to enforce a consent decree that bound the U.S. government and resolved wholly federal claims.

Slaughter aptly illustrates the confusion that imprecise language about jurisdiction can introduce into the doctrine. When a district court reserves to itself the exclusive authority to entertain enforcement actions on a consent decree, it is establishing a forum-selection rule that divests other district courts of venue to entertain such an action—venue, not subject-matter jurisdiction. The proper remedy in that situation is for the second court either to transfer the case to the court that issued the consent decree under the terms specified in *Atlantic Marine*[150] or else to enter a voluntary dismissal without prejudice and allow the plaintiff to return to the issuing court to employ whatever enforcement tools are provided for in the decree itself. Because it may introduce unnecessary complications to transfer a newly-filed action to the issuing court where the decree has established a mechanism for enforcement, voluntary dismissal of the new action without prejudice will often be the superior option. If a claimant refuses to cooperate in a voluntary dismissal, however, *Atlantic Marine* could be read to hold that the second court lacks the power to dismiss based solely on the forum-selection provision if venue is otherwise proper

[147] *See* Pigford v. Glickman, 185 F.R.D. 82, 86 (D.D.C. 1999).

[148] *Slaughter*, 555 Fed. App'x at 929.

[149] *Id.*

[150] Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 52 (2013) (describing the method a district court should use when a party files suit in an otherwise-appropriate venue in violation of a forum-selection clause).

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in the court where the plaintiff filed suit. In such a case, transfer may be the only option.[151]

The *Flores* settlement presents the uncommon case in which the issuing court approved a consent decree that expressly provides for subsequent enforcement in other federal district courts around the country.[152] Section 24(B) of the *Flores* decree authorizes any child migrant who is in the custody of the U.S. government and a member of the *Flores* class to bring an original action to enforce their rights under the decree in "any United States District Court with jurisdiction and venue over the matter."[153] This provision was a natural accommodation to the circumstances of the children the decree sought to protect. When children present themselves at a port of entry or cross the U.S. border without inspection and are subject to detention, there is an urgent need for them to have access to a convenient federal court in which to seek assistance if the conditions of their detention are illegal or harmful. Section 24(B) provides that mechanism by authorizing children to file an action to enforce the government's contractual obligations under the settlement in any district court that would satisfy the ordinary requirements of venue, meaning any district where a substantial part of the events or omissions giving rise to the claim occurred (which would include the place where the child is being detained) or any district where the child resides (which might mean the place where they are being detained, depending on their circumstances).[154]

In contrast, the *Flores* court retained for itself the exclusive prerogative to hear any subsequent enforcement actions involving the administration of the settlement on a class-wide basis,[155] reflecting the need for the issuing court to serve as the sole arbiter of the overall decree, as is commonly the case in class settlements. Both provisions are reasonable and enforceable forum-selection clauses under *The Bremen* and *Carnival Cruise Lines*, the one authorizing individual enforcement actions by individual children wherever the ordinary rules of venue would be satisfied and the other divesting all courts but the issuing tribunal of the prerogative to hear disputes relating to the class as a whole.

When courts and commentators speak loosely about which district courts can hear enforcement actions for consent decrees, invoking the language of subject-

[151] *See id.* at 55–56 (holding that a district court cannot dismiss for lack of venue to enforce a forum-selection clause where venue is otherwise proper under 28 U.S.C. § 1391).

[152] *Flores* Consent Decree, *supra* note 1.

[153] *Id.* at ¶ 24(B) at 14.

[154] *See* 28 U.S.C. § 1391(e)(1).

[155] *Flores* Consent Decree, *supra* note 1, ¶ 39 at 20.

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matter jurisdiction in solemn tones and discussing rigid ideas about limits on the powers of federal courts, nonwaivable requirements and the like, they cause confusion that can have serious material consequences. Greater clarity about the role of subject-matter jurisdiction in such matters and clear-eyed distinctions between a newly-filed action and a request to enforce an existing order through contempt sanctions can highlight and demystify the role of venue in allocating enforcement actions. Consent decrees are contracts that frequently contain forum-selection clauses. We have a well-developed vocabulary for discussing the enforceability of such decrees that does not require navigating the terrain of jurisdiction.

V. CONCLUSION

The role of federal common law in our system of civil adjudication is a matter of vital importance that is too little studied and inadequately understood. When *Erie* proclaimed that "[t]here is no federal general common law"[156] and overruled *Swift v. Tyson*,[157] it brought an abrupt end to the operation of federal courts as general-purpose common-law tribunals, effectuating a massive overnight change in the everyday business of the federal courts. It is perhaps no surprise that this shift in paradigm has left courts, lawyers, and commentators wary of embracing a robust account of the continuing role of federal common law, a wariness likely exacerbated by some commentators who have urged more maximalist approaches.[158] Understandable or not, that reticence often leads to poor reasoning and bad doctrine. The messy landscape of subject-matter jurisdiction in the enforcement of federal consent decrees is an apt illustration of the problem.

It is necessary to cast off this analytical timidity. Careful attention to the role of federal common law provides clarity to a host of issues that are important to the administration of civil adjudication in the federal courts.[159] As I hope this Article makes clear, the proper administration of federal consent decrees—when an enforcement action enjoys an independent basis of original jurisdiction in the federal courts; when ancillary jurisdiction in the issuing forum is the only option for federal enforcement; and when the type of remedy sought or the forum-selection provisions

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

[157] Swift v. Tyson, 41 U.S. 1 (1842); *Erie*, 304 U.S. at 79–80.

[158] *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887–88 (1986) (urging broad approach to federal common law that would authorize federal courts to create preemptive liability and regulatory rules "in the face of silent or ambiguous federal enactments whenever that lawmaking seems the most reasonable course").

[159] *See, e.g.*, Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1 (2018); Wolff, *Choice of Law and Jurisdictional Policy*, *supra* note 8; Burbank, *Interjurisdictional Preclusion*, *supra* note 80.

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of the decree might impose constraints on where a claim can proceed within the federal system that have nothing to do with jurisdiction—requires less reticence and greater clarity among judges in discussing federal common law as a source of authority and a rule of decision in civil adjudication.

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