AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Judicial Review

**Rodriguez v. Federal Deposit Insurance Corporation, 140 S.Ct. 713** (2020)

*Simon Rodriquez was the trustee for United Western Bancorp, Inc., a bankrupt company as well as the parent company of United Western Bank, which had also gone bankrupt and was under the trusteeship of the Federal Deposit Insurance Corporation (FDIC). As permitted by federal law, United Western Bancorp and United Western Bancorp filed a joint tax return. When the Internal Revenue Service declared they were owed a $4 million dollar refund, Rodriquez and the FDIC disputed how that refund should be distributed. A federal bankruptcy court declared that United Western Bancorp (Rodriquez) was entitled to the money, but that decision was reversed by a federal district court. The federal district court’s decision that the United Western bank (FDIC) was entitled to the money was sustained by the Court of Appeals for the Tenth Circuit.*

*Rodriguez appealed to the Supreme Court of the United States.*

 *The Supreme Court unanimously vacated the Tenth Circuit’s decision. Justice Neil Gorsuch’s majority opinion held that the case should have been resolved on the basis of state law rather than federal common law. The existence of federal common law that enables justices to resolve disputes solely on the basis of past precedent rather than federal statutory or constitutional law has long been controversial. The relevant precedent in this case was* In re Bob Richards Chrysler-Plymouth Corp*. (9th Cir. 1973), which held that refunds should go to the entitle most responsible for the losses that entitled the group to the refund. Why does Gorsuch claim that the role of federal common law in the United States is very limited? Why does he think state law should determine which party should get the benefit of a federal tax refund? What are the comparative advantages of basing federal judicial decisions on state law or on federal common law?*

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Id6e8095257e111eabf0f8b3df1233a01&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Id6e8095257e111eabf0f8b3df1233a01) delivered the opinion of the Court.

This case grows from a fight over a tax refund. But the question we face isn't who gets the money, only how to decide the dispute. Should federal courts rely on state law, together with any applicable federal rules, or should they devise their own federal common law test? To ask the question is nearly to answer it. The cases in which federal courts may engage in common lawmaking are few and far between. This is one of the cases that lie between.

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Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's “legislative Powers” in Congress and reserves most other regulatory authority to the States. As this Court has put it, there is “no federal general common law.”  Instead, only limited areas exist in which federal judges may appropriately craft the rule of decision.  These areas have included admiralty disputes and certain controversies between States. In contexts like these, federal common law often plays an important role. But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied. . . . In the absence of congressional authorization, common lawmaking must be “ ‘necessary to protect uniquely federal interests.’ ”

Nothing like that exists here. The federal government may have an interest in regulating how it *receives* taxes from corporate groups. The government also may have an interest in regulating the *delivery* of any tax refund due a corporate group. For example and as we've seen, the government may wish to ensure that others in the group have no recourse against federal coffers once it pays the group's designated agent. But what unique interest could the federal government have in determining how a consolidated corporate tax refund, once paid to a designated agent, is *distributed* among group members?

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. . . . Corporations are generally “creatures of state law,” and state law is well equipped to handle disputes involving corporate property rights. That cases like the one now before us happen to involve corporate property rights in the context of a federal bankruptcy and a tax dispute doesn't change much. As this Court has long recognized, “Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.”  So too with the Internal Revenue Code—it generally “ ‘creates no property rights.’ ” If special exceptions to these usual rules sometimes might be warranted, no one has explained why the distribution of a consolidated corporate tax refund should be among them.

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. . . . Some, maybe many, cases will come out the same way under state law or [*Bob Richards*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973108465&pubNum=0000350&originatingDoc=Id6e8095257e111eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). But we did not take this case to decide how this case should be resolved under state law or to determine how IRS regulations might interact with state law. We took this case only to underscore the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking.  *In re* [*Bob Richards*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973108465&pubNum=0000350&originatingDoc=Id6e8095257e111eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *Chrysler-Plymouth Corp.* (9th Cir. 1973) made the mistake of moving too quickly past important threshold questions at the heart of our separation of powers. It supplies no rule of decision, only a cautionary tale. Whether this case might yield the same or a different result without [*Bob Richards*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973108465&pubNum=0000350&originatingDoc=Id6e8095257e111eabf0f8b3df1233a01&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is a matter the court of appeals may consider on remand.