

# The Supremacy Clause, Original Meaning, and Modern Law

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*Under the U.S. Constitution, if federal interests conflict with state law, when must the latter give way? Although the Constitution's text appears to resolve the question in Article VI's Supremacy Clause, important recent scholarship argues that an approach anchored by the Supremacy Clause's text cannot provide a practical account of modern law nor useful guidance for the future. More broadly, these critiques use the example of the Supremacy Clause to cast general doubt upon text-based originalism as a practical tool for resolving modern disputes. This article defends a textual approach to key modern issues of supremacy, including executive foreign affairs preemption, preemptive federal common law, and non-self-executing treaties. It finds that, while modern doctrine and modern conceptions of law differ somewhat from the outlook of the founding era, these differences are not insurmountable obstacles: a combination of text and stare decisis, as indicated by the Supreme Court's approach to executive preemption in *Medellin v. Texas*, can supply workable solutions to modern supremacy debates. The article thus suggests that conventional academic concerns over the practicality of text-based originalism may be considerably overstated.*

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## I. INTRODUCTION

Under the U.S. Constitution, if federal interests conflict with state interests, when must the latter give way? One view is that the answer is found largely within the text and original meaning of the second clause of Article VI, the Supremacy Clause.<sup>1</sup> For others, this answer is too simplistic, assigning too much determinacy to the Clause's text, too much weight to the Clause's role in the original design, and too little attention to nuanced ways state-federal conflicts are resolved in modern adjudication. An approach anchored by the

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<sup>1</sup> The leading proponent of the textual approach is Professor Bradford Clark. See Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 701 (2008) [hereinafter Clark, *Federal Lawmaking*]; Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1261-64 (1996) [hereinafter Clark, *Federal Common Law*]. For discussion in the context of the Constitution's foreign affairs provisions, see MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 289-90 (2007).

Supremacy Clause's text, this view contends, cannot provide a practical account of modern law nor a useful path for the future.<sup>2</sup>

This debate affects at least three contentious issues of modern law. The first, a central issue in the U.S. Supreme Court's decision in *Medellin v. Texas*,<sup>3</sup> is executive preemption—the idea that presidential policies, especially in foreign affairs, can displace state laws. The second is federal common law, again especially in foreign affairs, where lower courts have suggested a “federal common law of foreign relations” of uncertain but potentially broad scope that can displace state law in international matters.<sup>4</sup> The third is the doctrine of non-self-executing treaties, as developed in recent decades in the lower courts<sup>5</sup> and given apparent endorsement by the Supreme Court in a different part of the *Medellin* decision.<sup>6</sup> Each question implicates the Supremacy Clause—the first two because they suggest displacement of state law by federal interests not found in Article VI's “supreme Law” and the third because it indicates that federal interests sometimes may not displace state law *even though* the federal interests are incorporated into a treaty, part of Article VI's “supreme Law.” Whether the Supremacy Clause's text can provide a coherent framework to address these issues is a central challenge to a text-based approach.

Broader theoretical concerns are at stake here. Originalism, especially originalism conceived as a focus upon the original meaning of the Constitution's text, has been called “a force to be reckoned with in American constitutional theory.”<sup>7</sup> But whatever its theoretical attractions, originalism faces a core practical challenge: is the modern legal world so far removed, doctrinally and theoretically, from the world of the Constitution's framers that implementing text-based originalism at a practical level—in the sense of modern judges deciding modern cases—is impossible?

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<sup>2</sup> Professor Henry Paul Monaghan's *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010), is an eloquent and insightful version of the skeptical view. Another important contribution is Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567 (2008).

<sup>3</sup> 552 U.S. 491 (2008).

<sup>4</sup> See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1625–39 (1997) (discussing and criticizing courts' use of a federal common law of foreign relations); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 594–614 (2006) (describing categories of federal common law).

<sup>5</sup> See David Sloss, *Non-self-executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 3–6, 12–16 (2002) (describing lower courts' non-self-execution doctrine).

<sup>6</sup> *Medellin*, 552 U.S. at 506–23; see David Sloss, *The United States, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* 509–14 (David Sloss ed., 2009) (discussing *Medellin*).

<sup>7</sup> THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 1 (Grant Huscroft & Bradley W. Miller eds., 2011); see also ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 78–89 (2011) (noting the prominence of originalism as a theory of interpretation); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–92 (2012) (defending text-based originalism as a core interpretive principle).

It is difficult to answer this question comprehensively, but one can assess the practicality of text-based originalism in particular fields. The Supremacy Clause seems a useful setting to consider the question, both because important unsettled issues turn upon its scope and because important modern theorists have invoked it as an example of text-based originalism's fundamental impracticality. Among recent scholarship, Henry Paul Monaghan's majestic *Supremacy Clause Textualism* and Peter Strauss's insightful essay *The Perils of Theory* both use the Supremacy Clause to illustrate broader claims that originalist/textualist analysis cannot supply workable modern solutions.<sup>8</sup>

The Supremacy Clause illustrates potential challenges to the modern use of originalism on at least two dimensions. First, as Professor Monaghan describes, modern courts have decided many lines of cases in ways that seem inconsistent with a strict reading of the Clause's text. Second, the rethinking of the nature of law associated with the rise of positivism in the nineteenth century and the "avulsive" change of *Erie Railroad Co. v. Tompkins*<sup>9</sup> in the early twentieth century revolutionized the way we think about lawmaking, especially at the federal level. Thus the legal world of the framers no longer exists, practically or theoretically, in ways that are central to a modern application of the Supremacy Clause. Generalizing from the experience of the Supremacy Clause, Professor Monaghan for example finds a "decisive objection to originalism-based textualism as a theory of constitutional adjudication" in that it "cannot account for a good deal of the contemporary constitutional order."<sup>10</sup>

This article disagrees. To be sure, some aspects—perhaps significant aspects—of modern law cannot be reconciled fully with the Supremacy Clause's text and original meaning. That need not mean, however, that we must abandon either the text or modern law. To the contrary, as this article describes, a combination of text and *stare decisis* can not only accommodate modern law but also point the way to future resolution of currently unsettled Supremacy Clause questions. Indeed, as this article explains, the U.S. Supreme Court appears to be pursuing a version of this approach, at least in part. Most notably, in its 2008 decision in *Medellin*, the Court acknowledged prior cases allowing sole executive agreements—which are not listed in the Supremacy Clause's text—to displace state law, but it declined to extend those cases to allow preemption of state law by mere presidential policy not reflected in an executive agreement.<sup>11</sup> As this article outlines, *Medellin's* approach to executive preemption readily transfers to other areas of tension between modern law and the Supremacy Clause's text. The point is not that textualist originalism faces

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<sup>8</sup> Monaghan, *supra* note 2, at 756–68; Strauss, *supra* note 2, at 1588–98.

<sup>9</sup> 304 U.S. 64 (1938); see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 740–41, 744–49 (2004) (Scalia, J., concurring in part and concurring in the judgment) (describing *Erie's* effect on theories of lawmaking).

<sup>10</sup> Monaghan, *supra* note 2, at 788.

<sup>11</sup> *Medellin*, 552 U.S. at 530–31. As discussed below, the Court arguably failed to use a parallel approach to *Medellin's* other Supremacy Clause issue, the doctrine of non-self-executing treaties.

no practical objections; it is, rather, that these objections are (as in the case of the Supremacy Clause) easily overstated.

The article proceeds as follows. Part II outlines the basic principles and consequences of a text-based theory of supremacy. Its central premise is that federal interests displace state law only to the extent federal interests are incorporated into one of the three categories of federal lawmaking found in Article VI: the Constitution, “Laws made in Pursuance thereof,” and U.S. treaties. As a result, state laws cannot be displaced by executive branch policies or judicial assessments of federal interests lacking constitutional or statutory grounding.<sup>12</sup> On the other hand, federal interests that do come within the Clause’s text are supreme and thus displace state law without qualification (a point that, in the case of treaties, remains substantially in doubt in modern law).<sup>13</sup>

Part III examines the Supremacy Clause’s original meaning as reflected in text, structure, and history. It concludes that the Clause, together with the textual allocations of power in Articles I, II, and III, show that federal “Laws” are “made” pursuant to the Constitution only by Congress acting under Article I, Section 7. Only these “Laws,” plus the Constitution and federal treaties, are supreme. Part III also considers the Clause’s drafting and ratifying history, and concludes that it supports the Clause’s role as establishing an expressly limited federal supremacy checked by the states’ representatives in the Senate. Part III finally considers leading structural and historical objections to text-based supremacy as a matter of the Constitution’s original understanding. In particular, it considers structural difficulties that seem to arise in the Constitution’s original design, as well as the implementation of supremacy in post-ratification history, and concludes that these objections are insufficient to raise doubts about a textual approach to supremacy as a matter of the Constitution’s original meaning.

Part IV turns to the relationship between the Supremacy Clause and the modern law of state–federal relations. Contemporary scholars argue with considerable force that, whatever the Clause’s original meaning, entrenched aspects of modern law have moved far beyond the limits its text would impose. They thus conclude that the pure textual reading cannot have much force in modern adjudication.<sup>14</sup> Part IV finds that, while modern law departs to some degree from the Clause’s textual meaning, the departure is not as great as suggested. Some apparent tensions between modern law and the Clause’s text are, on closer examination, not inconsistencies. Areas of departure can be described as and confined to limited doctrines that do not require re-conceiving

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<sup>12</sup> See Clark, *Federal Lawmaking*, *supra* note 1, at 701–03; RAMSEY, *supra* note 1, at 289; see also Monaghan, *supra* note 2, at 732–39 (describing this approach and terming it “Supremacy Clause textualism”).

<sup>13</sup> See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 646–68 (2008) (discussing non-self-execution in light of *Medellin*).

<sup>14</sup> Monaghan, *supra* note 2, at 756–81.

how supremacy is implemented in other areas. In short, modern law can be described as faithful to Supremacy Clause textualism, subject to limited categorical exceptions.

Part V sketches an approach for the future. It argues that the partial erosion of the Clause's textual meaning in modern law does not show that the textual meaning must be wholly abandoned. Drawing on the Court's decision in *Medellin*, this Part concludes that a clear understanding of and commitment to the Clause's textual role can be deployed to limit further erosion and to clarify areas that are currently unsettled. Because modern departures from the Clause's text can be precisely and narrowly defined, they can be accepted as matters of stare decisis without requiring us to abandon the textual approach. As this Part concludes, *Medellin*'s treatment of presidential foreign affairs preemption<sup>15</sup> can be applied in a variety of areas to provide practical solutions to unsettled issues of supremacy. In particular, this approach can help resolve the troubled areas of non-self-executing treaties and of the federal common law of foreign relations.

That conclusion, the article argues more broadly, indicates that practical objections to text-based originalism may be overstated. Of course, it does not prove that textualism can provide workable modern solutions in all areas of constitutional law. But it does show that one area frequently held out as unworkable is in fact quite amenable to a text-based approach.

## II. THE TEXT-BASED APPROACH TO SUPREMACY

### A. *Basic Outlines and Tensions with Modern Law*

Article VI, Clause 2, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>16</sup>

"Supremacy Clause textualism" (Professor Monaghan's phrase, which this article embraces) holds that this language sets forth the exclusive constitutional route by which federal interests displace state law. As a result, Supremacy Clause textualism recognizes three (and only three) sources of supreme federal law. The first source is the Constitution itself, either through express limitations on the states (chiefly in Article I, Section 10) or through implied limitations

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<sup>15</sup> As noted, *Medellin* was only a partial victory for this approach: while rejecting the claimed preemptive effect of presidential policies, the *Medellin* Court failed to adopt an unambiguously textual approach to the preemptive effect of treaties.

<sup>16</sup> U.S. CONST. art. VI, cl. 2.

such as the much-debated dormant Commerce Clause doctrine.<sup>17</sup> The second source is federal laws “made in Pursuance” of the Constitution, meaning laws enacted through the Bicameralism and Presentment Clauses of Article I, Section 7 and otherwise in accord with constitutional limitations. The third source is U.S. treaties, including treaties that pre-existed the Constitution and those made through Article II, Section 2.<sup>18</sup>

One consequence of this reading is that, aside from limitations on states found in the Constitution itself, supreme federal law must arise with the consent of the Senate. That structure had particular importance under the original Constitution, in which state legislatures controlled the method of selecting Senators<sup>19</sup> (this approach was changed to direct popular election by the Seventeenth Amendment in 1913). Because state legislatures would exercise some ultimate control over Senators, at least in theory, this design meant that supreme federal law had to be made with the consent of a body chosen by the states. A second consequence, which remains even after the Seventeenth Amendment, is that making supreme federal law requires the formal consent of multiple independent elements of the national government: the President plus majorities of two separately elected Houses; a supermajority of each of the two Houses; or the President plus a supermajority of one House in the case of treaties.<sup>20</sup> Thus states are protected by the sheer difficulty of getting anything done at the federal level.<sup>21</sup>

This account in turn contains three important corollaries. Two of them limit federal power: preemptive federal law cannot arise from the executive branch or the courts. The third result is that sources of law that *are* found in the Clause’s text comprehensively displace state law. Each proposition warrants some additional explanation.

### 1. *No Executive Preemption*

A central proposition of Supremacy Clause textualism is that the President acting alone cannot displace state law. The issue is illustrated by the Court’s decision in *Medellin*, in which President George W. Bush argued that a

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<sup>17</sup> See Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 89 (2006). As will become clear, this article takes no position on the question whether and to what extent constitutional grants of power to federal entities create implied limits on the states.

<sup>18</sup> See Clark, *Federal Lawmaking*, *supra* note 1, at 701 (“The direct effect of the Clause is that these three sources of law override contrary state law. The negative implication of the Clause is that state law continues to govern in the absence of these sources.”).

<sup>19</sup> U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

<sup>20</sup> Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001); Clark, *Federal Lawmaking*, *supra* note 1, at 700–02.

<sup>21</sup> See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1791–92 (2005).

presidential memorandum purporting to direct enforcement of a judgment of the International Court of Justice (ICJ) displaced Texas state criminal sentencing law as applied to the petitioner, José Medellín. A majority of the Court rejected the President's claim, holding that displacement of otherwise-constitutional state law required a federal lawmaking act, and that the President, as holder of executive power, could not be a lawmaker.<sup>22</sup>

While *Medellin's* view of executive preemption is firmly consistent with Supremacy Clause textualism, other modern decisions are less so. In a series of cases—*United States v. Belmont*,<sup>23</sup> *United States v. Pink*,<sup>24</sup> and *Dames & Moore v. Regan*<sup>25</sup>—the Court held that at least some executive agreements (international agreements made by the President without approval by Congress or the Senate) have preemptive force over state law. In *American Insurance Ass'n v. Garamendi*, the Court held that a presidential policy of resolving Holocaust-era claims against foreign insurance companies, indicated by a series of executive settlement agreements, displaced a California state law arguably supporting the litigation of such claims.<sup>26</sup> Some lower courts have taken *Garamendi* to mean that mere presidential policies, even if not directly incorporated into an executive agreement, may displace state law.<sup>27</sup> These cases appear to give preemptive force to federal executive interests not based upon any of the three sources of preemptive law listed in the Supremacy Clause.<sup>28</sup>

It is important, however, not to overstate the Supremacy Clause's rule against executive preemption. Professor Monaghan, in his leading article on text-based preemption, suggests that a strict reading of the Clause's text would call into question what he calls "administrative lawmaking"—that is, federal administrative regulations displacing state law.<sup>29</sup> At least as applied to ordinary administrative acts, it does not. To the extent that an agency (or the President

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<sup>22</sup> *Medellin v. Texas*, 552 U.S. 491, 526–27 (2008); see Michael D. Ramsey, *International Wrongs, State Laws and Presidential Policies*, 32 LOY. L.A. INT'L & COMP. L. REV. 19, 20–22 (2010).

<sup>23</sup> 301 U.S. 324, 330–32 (1937).

<sup>24</sup> 315 U.S. 203, 233–34 (1942).

<sup>25</sup> 453 U.S. 654, 655–56 (1981).

<sup>26</sup> 539 U.S. 396, 396–97 (2003).

<sup>27</sup> E.g., *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 117–20 (2d Cir. 2010).

<sup>28</sup> On executive agreements, see RAMSEY, *supra* note 1, at 283–99; Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1581–84 (2007); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 139–45 (1998). On executive policy preemption, see Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 347–48 (2006); Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 898–901 (2004).

<sup>29</sup> Monaghan, *supra* note 2, at 756; see Craig Green, *Erie and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 675–76 (2008) (also making this claim); see also Clark, *Federal Lawmaking*, *supra* note 1, at 715–16 (acknowledging some force to this argument but suggesting that it is diminished by the Court's decisions rendering non-delegation claims effectively non-reviewable).



directly) acts with statutory authority, the statutory authority supplies the basis for displacing state law. One may object that Congress has improperly delegated lawmaking authority to the agency (or the President).<sup>30</sup> But that is an entirely separate proposition. Supremacy Clause textualism is agnostic on questions of delegation. If Congress has constitutional authority under Article I, Section 8 to vest lawmaking authority in a non-Article I body, be it an agency, the President, or a court,<sup>31</sup> laws made by that entity are “made in Pursuance” of the Constitution and have supreme force by the Supremacy Clause’s text. If, as modern law appears to hold,<sup>32</sup> Congress cannot, strictly speaking, delegate legislative authority but may convey interpretation or implementation authority to a non-Article I body, Congress’s own act—combined with the acts of interpretation/implementation of the body receiving the delegation—creates supreme law. And if Congress lacks delegation power altogether, attempts to make supreme law pursuant to delegated power are invalid, but their invalidity arises from the non-delegation principle. In sum, whether agency rulemaking pursuant to statutory authority is problematic turns on one’s view of the non-delegation doctrine, not on one’s view of the Supremacy Clause.<sup>33</sup>

## 2. *No Preemptive Federal Common Law*

Potentially the most problematic implication of Supremacy Clause textualism is that federal courts cannot create law that displaces state law. Modern doctrine embraces federal common law made by judges and superior to state law, albeit limited to particular topics.<sup>34</sup> For example, as the Court declared in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* in 1938,<sup>35</sup> disputes between states, if not governed by statutes or treaties, can be resolved by common law principles developed by federal courts. This “federal common

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<sup>30</sup> See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 347, 350–53 (2002).

<sup>31</sup> See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1725–26 (2002) (arguing this view). But see Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1302–03, 1305–07 (2003) (making counterarguments).

<sup>32</sup> *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001).

<sup>33</sup> Agency rulemaking that is *not* done on authority of a statutory delegation raises the same Supremacy Clause issues as ordinary executive preemption in *Garamendi* and other executive agreement cases. But it also has no sound basis in modern law. See *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”).

<sup>34</sup> See Tidmarsh & Murray, *supra* note 4, at 594–614 (describing categories of modern federal common law).

<sup>35</sup> 304 U.S. 92, 110 (1938).

law" (as the Court expressly called it)<sup>36</sup> would displace even state statutes to the contrary. In a series of cases following *Hinderlider*, the Court extended this idea to other areas of what it called "uniquely federal interests," including the law governing the rights and obligations of the United States (*Clearfield Trust Co. v. United States*),<sup>37</sup> admiralty,<sup>38</sup> and foreign affairs (*Banco Nacional de Cuba v. Sabbatino*).<sup>39</sup> In the notable modern case *Boyle v. United Technologies Corp.*,<sup>40</sup> the Court held that federal interests precluded a suit under Virginia state tort law against a private contractor for defective design of a military helicopter. The Court acknowledged that no federal statute or treaty displaced the Virginia law, and it did not attempt to rest its decision on a particular constitutional provision.<sup>41</sup> Rather, it said, the existence of important federal interests allowed the Court itself to displace state law.<sup>42</sup>

Supremacy Clause textualism raises substantial doubts about the propriety of these doctrines. At minimum, it would require re-describing the idea of federal common law. The Clause's text does not empower judges to use principles created by judges (or otherwise found outside Article VI) to displace state law. It may be possible, as Bradford Clark has argued, to re-conceive many doctrines of "federal common law" to rest on constitutional grants of authority.<sup>43</sup> If so, they would become consistent with Supremacy Clause textualism (subject, in the case of statutory grants, to non-delegation objections). It may be the case, however, that significant aspects of modern federal common law would need more fundamental reconsideration in light of the Supremacy Clause's text.<sup>44</sup>

Nonetheless, as with executive preemption, it is important not to overstate. First, many lines of cases labeled federal common law are understood to arise from statutory delegations of common law authority to the federal courts or otherwise to represent the federal courts' implementation of statutory schemes.<sup>45</sup> As with administrative preemption, this type of court-created law

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<sup>36</sup> *Id.* (finding the dispute to be "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive").

<sup>37</sup> 318 U.S. 363, 366 (1943) (federal common law displaces state law with respect to the "rights and duties of the United States on commercial paper which it issues").

<sup>38</sup> *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 309 (1943); *Davis v. Dep't of Labor & Indus.*, 317 U.S. 249, 255-56 (1942).

<sup>39</sup> 376 U.S. 398, 425 (1964).

<sup>40</sup> 487 U.S. 500, 500 (1988).

<sup>41</sup> *Id.* at 505-06.

<sup>42</sup> *Id.*

<sup>43</sup> Clark, *Federal Common Law*, *supra* note 1, at 1271-75. Clark argues, for example, that federal common law rules relating to foreign affairs arise from constitutional structure allocating foreign affairs power exclusively to the federal government. *Id.* at 1292-1311.

<sup>44</sup> See *infra* Part IV.

<sup>45</sup> E.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1963). Modern courts typically describe as "federal common law" doctrines implementing open-ended or delegative federal statutes or otherwise resting on statutory direction, although arguably that label is inappropriate. See RICHARD H.

may raise delegation issues (or represent doubtful constructions of the applicable statutes), but it does not raise tension with the Supremacy Clause because the preemptive authority can be traced back to a statutory (Article VI) enactment. Second, Supremacy Clause textualism says nothing about federal courts' ability to craft rules of decision that are *not* preemptive or to find non-preemptive rules of decision outside the three Article VI categories.<sup>46</sup> For example, the federal Alien Tort Statute (ATS),<sup>47</sup> as interpreted by the Court in *Sosa v. Alvarez-Machain*,<sup>48</sup> appears to contemplate federal courts adopting rules of decision from customary international law, which is not an Article VI source. One could regard the ATS as a statutory delegation of lawmaking (or perhaps law-finding) authority, but for most ATS cases it is not necessary to do so. In modern practice ATS claims tend to involve injuries to which state laws typically do not apply or do not apply exclusively. As a result, the typical ATS case (like *Sosa* itself)<sup>49</sup> does not ask a court to use a cause of action based on customary international law to displace conflicting state law; it only asks a court to recognize a cause of action based on customary international law in the absence of conflicting state law. Such claims may implicate constitutional issues, but not ones arising from the Supremacy Clause. Thus it is crucial to understand that Supremacy Clause textualism is not a challenge to federal common law (whether or not derived from customary international law); it is a challenge to *preemptive* federal common law.<sup>50</sup>

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FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003) (defining federal common law as "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands"); Tidmarsh & Murray, *supra* note 4, at 590–93 (discussing broader definitions of federal common law). These types of law, whatever they are properly called, do not raise Supremacy Clause issues. For purposes of this article, federal common law is problematic only to the extent it lacks an Article VI source.

<sup>46</sup> See Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 659–60 (2013) ("[T]here is no categorical constitutional prohibition against the application of general law in federal court. Rather, the application of such law is problematic only when it disregards state law with no basis in the Supremacy Clause for doing so.").

<sup>47</sup> 28 U.S.C. § 1350 (2006).

<sup>48</sup> 542 U.S. 692, 724 (2004).

<sup>49</sup> See *id.* at 698–99 (claim involving tort allegedly committed by Mexican citizen against Mexican victim in Mexico). The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668–69 (2013), limited the extraterritorial scope of ATS claims on unrelated grounds, but to the extent ATS claims against non-U.S. defendants survive *Kiobel* they generally are unlikely to conflict with state law.

<sup>50</sup> As Part IV elaborates, this point has critical importance because discussions of the legitimacy of federal common law often intertwine with discussions of the Supremacy Clause. *E.g.*, Clark, *Federal Common Law*, *supra* note 1, at 1271–75 (describing need to reconceive all federal common law, including non-preemptive federal common law); see Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595, 617–18 (2008).

### 3. Complete Preemption by Article VI Sources of Law

The preceding points illustrate Supremacy Clause textualism's protection of the states. A third implication of Supremacy Clause textualism reveals its nationalist side: just as federal interests *not* part of Article VI law are not preemptive, federal interests that *are* part of Article VI law are fully preemptive. Because the lawmaking processes underlying Article VI law protect the states in the ways described above, once these processes are successfully navigated there should not be federalism-based barriers to displacement of state law.

This proposition is generally uncontroversial for the Constitution itself and for constitutionally valid federal statutes. Greater doubts arise with respect to treaties. Some commentators suggest a structural need to limit treaties' content (or at least treaties' preemptive content) to protect federalism values.<sup>51</sup> Further, in modern law, the doctrine of non-self-execution suggests that, despite the Supremacy Clause, some valid treaties will not displace conflicting state law. Indeed, the *Medellin* decision, which denied preemptive effect to a presidential policy, also denied preemptive effect to a treaty despite treaties' status as supreme Article VI law. According to the Court, some treaties require implementation by statute to displace state law.<sup>52</sup> Without further explanation, that view appears to raise substantial tension with Article VI's direction that "all" treaties are supreme law.<sup>53</sup>

#### B. Academic Responses

Academic commentary on the apparent tensions between the Supremacy Clause's text and modern law takes three principal forms. One approach rejects the Clause's text as a useful guidepost. As Professor Monaghan forcefully argues, "Supremacy Clause textualism [can]not supply a satisfying theory of our contemporary constitutional order because it is inconsistent with deeply entrenched practices and thus would destabilize far too much settled doctrine."<sup>54</sup> He concludes that today "the word 'Laws' in the Supremacy Clause

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<sup>51</sup> E.g., Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1; Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 450, 456 (1998). Modern law appears to reject federalism limits on treaties, see *Missouri v. Holland*, 252 U.S. 416, 434 (1920), but that conclusion has been challenged in *United States v. Bond*, 681 F.3d 149, 157–58 (2012), *cert. granted*, 133 S. Ct. 978 (2013). On the Constitution's original meaning on this point, see Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 978–81 (2008) (defending *Holland's* conclusion).

<sup>52</sup> *Medellin v. Texas*, 552 U.S. 491, 506 (2008).

<sup>53</sup> See Vázquez, *supra* note 13, at 616–19.

<sup>54</sup> Monaghan, *supra* note 2, at 742; see also Strauss, *supra* note 2, at 1598 (Supremacy Clause textualism "would unhinge too much of our constitutional tradition and understanding.").

must now be taken to include more than Acts of Congress; it must encompass the commands . . . of any institution whose lawmaking authority has been recognized over time.”<sup>55</sup> That approach is acceptable, he further argues, first because Supremacy Clause textualism itself contains textual and historical difficulties that make it not entirely satisfactory on its own terms, and second because “important aspects of the intellectual world of the Founders have wholly vanished, rendering greatly problematic any originalist understanding of the Supremacy Clause.”<sup>56</sup> As a result, a form of “constitutional common law,” rather than the Clause’s text, should guide our approach to issues of supremacy and preemption.<sup>57</sup>

An alternative view would insist upon the Clause’s text despite substantial conflict with modern law: if the text is inconsistent with modern doctrine, so much the worse for modern doctrine. Professor Monaghan’s concern over “destabiliz[ing] . . . settled doctrine” is problematic only if one thinks modern doctrine cannot be dispensed with,<sup>58</sup> and in any event strong views of the preeminence of text over Court decisions would not allow such policy concerns to prevail.<sup>59</sup>

Professor Bradford Clark offers a third approach. Clark contends that some conflicting modern practice can be reconciled with the Supremacy Clause’s text by re-conceiving modern doctrines to rest upon the Constitution. Doctrines we now call federal common law may be better understood as mandated by the Constitution itself—for example, by the structural allocation of foreign affairs power to the federal government. Thus re-described, they would be consistent with the Clause’s text, because they would arise from an Article VI source.<sup>60</sup> Clark finds, however, that some modern law could not be so re-described, and under his approach it would need to be abandoned.

The present article offers an alternative path that does not require abandoning the Supremacy Clause’s text and original meaning or abandoning (or substantially re-describing) modern law. First, by carefully describing the requirements of the Supremacy Clause and modern law’s entrenched features, we can see that the tensions between them are not as great as supposed. Second,

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<sup>55</sup> Monaghan, *supra* note 2, at 742.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 781.

<sup>58</sup> E.g., Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 792 (1989) (doubting the need for and legitimacy of federal common law).

<sup>59</sup> E.g., Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) (“*Stare decisis* is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution!”); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (“[T]he practice of following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution.”).

<sup>60</sup> E.g., Clark, *Federal Common Law*, *supra* note 1, at 1271–75; Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 74–75 (2009).

because the aspects of modern law that raise tensions with the Clause can be narrowly and categorically described, combining stare decisis and original meaning can provide a practical approach to resolving supremacy disputes that does not further erode the Clause's original meaning but also does not require substantial changes in entrenched modern law.

### III. THE SUPREMACY CLAUSE'S ORIGINAL MEANING

This Part restates and clarifies the textual and historical basis of Supremacy Clause textualism. It also considers two important objections: that structural imperatives require departure from the text as a matter of constitutional design, and that post-ratification judicial practice is inconsistent with a strictly textual view of the Clause.

#### A. *The Supremacy Clause Within the Constitution's Text*

Professor Monaghan and others object that Supremacy Clause textualism as sketched above is not compelled by the Clause's language standing alone.<sup>61</sup> In particular, the Clause does not explain what it means by "Laws": must that mean only statutes made via Article I, Section 7 (as Supremacy Clause textualism maintains) or may it include laws made in other ways, such as by federal executive or judicial action?

This objection lacks force because Supremacy Clause textualism does not (or should not) assert that the Supremacy Clause stands alone. The Clause is part of an integrated design that permeates the Constitution's structure as a whole, and in particular arises from the grants of power in the text's initial three articles. It is true, as Professor Monaghan says, that one must look elsewhere to see how "Laws" are "made in Pursuance" of the Constitution. But the Constitution's text answers that question clearly and confirms Supremacy Clause textualism's basic propositions.

Article I, Section 7 provides that Congress can make law only by bicameralism and presentment. Expressions of congressional policy made in other ways are not Article I "laws" and do not qualify for supremacy.<sup>62</sup> Indeed, Section 7 goes out of its way to assure that Congress does not attempt creatively to end-run its procedures.<sup>63</sup> Further, the Constitution's text does not permit non-

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<sup>61</sup> Monaghan, *supra* note 2, at 748–53; *see, e.g.*, Strauss, *supra* note 2, at 1568–73.

<sup>62</sup> *See* INS v. Chadha, 462 U.S. 919, 951 (1983) ("[T]he legislative power of the Federal Government [must] be exercised in accord with a single, finely-wrought and exhaustively considered, procedure" in Article I, Section 7.).

<sup>63</sup> After providing for bicameral approval and presentment to the President in the case of "[e]very Bill . . . before it [shall] become a Law," Section 7 further provides that "the Rules and Limitations prescribed in the Case of a Bill" also apply to "[e]very Order, Resolution or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary . . . ." U.S. CONST. art. I, § 7.

Article I laws (aside from treaties, which the Supremacy Clause describes separately). This second proposition in turn is reflected in three different ways.

First, Article I, Section 1 declares that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . .”<sup>64</sup> In eighteenth-century language, “legislative” power was the power to make law. A power’s characterization as “legislative” did not turn on the branch of government exercising it, as Montesquieu’s well-known discussion made clear.<sup>65</sup> In eighteenth-century separation-of-powers theory, the definition arose from the act’s character; the preferred allocation of the power among branches followed as a policy matter. Thus when Montesquieu said that monarchs should not have “legislative” power, he meant that monarchs should not make law. Montesquieu recognized that in some systems a monarch *could* exercise legislative power—in France the king often did—by issuing decrees with the force of law, but as a matter of separation-of-powers theory he thought this should not be permitted.<sup>66</sup> Correspondingly, Article I, Section 1’s rule is not that all things Congress does shall be called legislative, but rather that all things of a “legislative” (lawmaking) nature must be done by Congress.

Second, Article II, Section 1 grants the President only “executive Power.”<sup>67</sup> In eighteenth-century language, “executive” power was understood in opposition to legislative power. Executive power, whatever it might contain, did *not* encompass lawmaking power.<sup>68</sup> Defining the President through “executive” power made clear a central proposition of post-1688 English practice and eighteenth-century separation-of-powers theory: the Chief Magistrate (whether monarch or President) should execute the laws, not make them. Article II, Section 1 works together with Article I, Section 1 to implement the fundamental division of lawmaking/law-executing functions espoused by separation-of-powers theory.

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<sup>64</sup> U.S. CONST. art. I, § 1.

<sup>65</sup> CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 151–62 (Prometheus Books 2002) (1748).

<sup>66</sup> *Id.* at 152–53. For example, Montesquieu famously argued that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.” *Id.* at 152; accord *THE FEDERALIST* No. 47, at 303 (James Madison) (Isaac Kramnick ed., 1987) (“The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny.”). See generally M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 83–168 (2d ed. 1998) (discussing eighteenth-century separation-of-powers theory).

<sup>67</sup> U.S. CONST. art. II, § 1.

<sup>68</sup> MONTESQUIEU, *supra* note 65, at 152–53; see RAMSEY, *supra* note 1, at 91–114. Blackstone’s influential *Commentaries* emphasized this point, see 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 142–43, 261 (1765–1769), as did *The Federalist*. See *THE FEDERALIST* No. 47, *supra* note 66, at 304 (stating that, in England, “[t]he magistrate in whom the whole executive power resides cannot of himself make a law”).

Finally, Article III vests federal courts with “the judicial Power.”<sup>69</sup> In contrast to executive and legislative power, eighteenth-century separation-of-powers theory had a less complete understanding of judicial power. But at least in theory, eighteenth-century discourse maintained that judges did not “make” law. To be sure, in England and America judges applied law that did not come from statutory enactments. But (again in theory) this was not law of the judges’ making—it came, for example, from ancient custom reflected in the practices of the community, or from deductive reasoning from natural principles.<sup>70</sup> These statements require some hedging, for it seems clear that eighteenth-century judges often did “make” law in the sense that we understand it (that is, they applied law they created, rather than simply discovering and applying ancient custom or natural principles), and that eighteenth-century observers understood that this was happening. However, the theoretical proposition remained firm: judges might “discover” law from various sources but this law was not *made* by judges.<sup>71</sup> Thus Article III, Section 1 (like Article II, Section 1) complements Article I, Section 1. Federal judges did not have “legislative” (lawmaking) power because (a) that was assigned wholly to Congress by Article I, Section 1 and (b) by Article III, Section 1, they had only “judicial” power, which did not include the power to *make* law. As a result, judges might “discover” non-statutory law and apply it where appropriate, but that law would not be “made” in pursuance of the Constitution, as Article VI requires for supreme law. As Professor Monaghan rightly concludes, “[f]ocus should be trained on the word ‘made,’ not ‘Laws’ [in the Supremacy Clause].”<sup>72</sup>

In sum, it is true that the Supremacy Clause’s text cannot stand on its own, but Supremacy Clause textualism need not assert that it does. The Clause says that the Constitution, treaties and “Laws made in Pursuance” of the Constitution are supreme; other parts of the Constitution say how laws are made, and they confirm that, in the Constitution’s original design, laws “made in Pursuance” of the Constitution are made only by Congress, pursuant to Article I, Section 7.<sup>73</sup>

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<sup>69</sup> U.S. CONST. art. III, § 1.

<sup>70</sup> MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 4–9 (1977).

<sup>71</sup> As the Supreme Court said as late as 1875: “But we must always remember that the court cannot make the law, it can only declare it.” *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576–77 (1875); see Monaghan, *supra* note 2, at 769–77 (similarly concluding that common law in the founders’ era was not understood as “made” by judges).

<sup>72</sup> Monaghan, *supra* note 2, at 777; cf. Strauss, *supra* note 2, at 1570 (focusing on “Pursuance” as the central word and arguing that “one readily may interpret [Pursuance] to refer embracingly to any action that may be regarded as ‘law’”).

<sup>73</sup> I do not understand Professor Monaghan to disagree with this account of the Clause’s original meaning. His objection, I take it, is that this meaning does not translate into modern conceptions of law, a point discussed in Part IV below.



### B. *The Supremacy Clause's Role in the Drafting and Ratifying History*

Perhaps, however, this textual account gives too much prominence to the Supremacy Clause as a limit on federal power. The Clause, in the standard account of its origins, was profoundly nationalistic, rejecting the weakly constructed union of the Articles of Confederation and creating a true national government that would prevail in contests with the states—and indeed enlisting state judges as enforcers of national power.<sup>74</sup> It was, one might say, “intended as a nationalizing, not a state-protective, clause.”<sup>75</sup>

This claim seems to insist too strongly that a provision be either nationalizing or state-protective. The entire Constitution worked a compromise between the need to establish a more centralized government than existed under the Articles and the need to assure state-oriented delegates and, ultimately, potential ratifiers that it did not go too far toward centralization. And just as the Constitution as a whole had both nationalizing and state-protective elements, there is no reason to suppose that particular clauses did not also have such a mix of objectives.

So it seems with the Supremacy Clause. No doubt the delegates wished to protect the central government from state encroachment and assure that national interests would override state interests where appropriate. The lack of such provisions had been a central failing of the Articles. By adding the Supremacy Clause—which had no Articles counterpart—the delegates assured a protection for federal interests that the Articles lacked. But it would be remarkable if such an expansion of national power at the expense of the states did not provoke concern among delegates mindful of state interests. In a document born of compromise, one would expect that a nationalizing provision would come with some offer of reassurance. One way to reassure would be to describe national supremacy in limited and precise terms—that is, the nationalizing Clause itself would have counterbalancing features making it palatable to those most concerned about undue nationalization.

A purely nationalist account of the Supremacy Clause omits important evidence suggesting that this dynamic underlay the adoption of the Clause and that its counterbalancing features were well understood. To begin, the potential textual ambiguity discussed above—that the Clause itself does not say who can make “Laws in Pursuance” of the Constitution—was not present through most of the Convention. The language forming the basis of the Supremacy Clause first appeared in William Paterson’s proposal, the so-called “New Jersey Plan,” introduced in the Convention on June 15, 1787. Paterson proposed that

[A]ll Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the

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<sup>74</sup> Monaghan, *supra* note 2, at 742–55.

<sup>75</sup> *Id.* at 743.

supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective law of the Individual States to the contrary notwithstanding.<sup>76</sup>

This language approximates the Clause's final version, except that the laws it made supreme were treaties and "Acts of the U. States in Congs."—that is, statutes. After the Convention rejected Paterson's plan in favor of continuing with the Virginia plan, Luther Martin proposed adding a version of Paterson's Supremacy Clause to the Virginia plan. Martin's version, which the Convention without recorded opposition adopted on July 17, was also clear that supreme federal lawmaking could only come from Congress: "[T]he Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective states . . . ."<sup>77</sup> At this point the Convention's draft referred to Congress as the "National Legislature,"<sup>78</sup> and delegates commonly called it the "legislative" branch. "Legislative acts" in Martin's draft plainly meant acts of Congress, not of other branches. Thus at the key point when the Convention adopted Martin's proposal to assure federal supremacy, there could have been no doubt in the delegates' minds that federal supremacy would be accorded only to treaties and laws made by Congress.

Later in the Convention, the Committee of Detail, which reported a complete draft of the Constitution on August 6, retained the Paterson/Martin formulation referring to laws passed by Congress: "The Acts of the Legislature of the United States made in Pursuance of this Constitution, and all Treaties made under the Authority of the United States shall be supreme Law of the several States . . . ."<sup>79</sup> When the Convention finally took up this formulation on August 23, a motion by John Rutledge altered it to almost its final form: "This Constitution & the laws of the U.S. made in pursuance thereof."<sup>80</sup> Presumably Rutledge's main point was to add "This Constitution" to the list of supreme laws; nothing suggests any other motive to the rewrite, and no one commented on or objected to the effect of this change on the other sources of supreme law.

Further, there are reasons to think the delegates regarded the Clause as an important protection for the states. First, Martin's motion was adopted shortly after the Convention gave control over selection of Senators to the state legislatures. The delegates expressly understood vesting appointment of Senators in the state legislatures to be an important protection of the states. Madison's "Virginia Plan," which formed the initial baseline of the

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<sup>76</sup> 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 245 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

<sup>77</sup> 2 *id.* at 28–29.

<sup>78</sup> 1 *id.* at 235.

<sup>79</sup> 2 *id.* at 183. The Committee clarified that state constitutions as well as state laws were subordinate to federal law.

<sup>80</sup> *Id.* at 389. The final language came from the Committee of Style. *See id.* at 603.

Convention's deliberations, gave the popularly elected federal House the power to appoint Senators. John Dickinson proposed the key change on June 7, explaining that the Senate would express "the sense of the States" which "would be better collected through their Governments; than immediately from the people at large."<sup>81</sup> Dickinson further elaborated: "The preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other."<sup>82</sup> Roger Sherman, seconding the motion, "observed that the particular States would thus become interested in supporting the National Government and that a due harmony between the two Governments would be maintained."<sup>83</sup> In support, George Mason put the point most directly: "The State Legislatures also ought to have some means of defending themselves agst. encroachments of the Natl. Govt. . . . And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment."<sup>84</sup> Nationalist delegates led by Madison and James Wilson opposed Dickinson's motion, but it prevailed by a wide margin.<sup>85</sup>

The drafting sequence is telling: the delegates first gave state legislatures control of the Senate, and then (ten days later) adopted a version of the Supremacy Clause requiring that all supreme law would go through the Senate. Even if no delegate directly remarked on the connection, it is hard to think of the Clause other than as assuring the states a voice in deciding what federal interests would displace state interests.

Further, the delegates were actively struggling with the difficulty of assuring adequate federal supremacy without stoking too much opposition by the states. Madison's Virginia plan proposed giving Congress a "negative" on state laws that "in the opinion of Congress" interfered with federal interests.<sup>86</sup> Although the Convention initially accepted his proposal, the delegates later changed their minds, and after resisting Madison's attempt to broaden the negative to cover "all cases," they took it out entirely.<sup>87</sup> As Gouveneur Morris (himself a nationalist) made clear, there was concern that excessively nationalist proposals would not be ratified: the negative, he said, would be "terrible to the States."<sup>88</sup> With the delegates casting around for an alternative, Martin—an obstreperous states-rights advocate—proposed language that approximated the Supremacy Clause from Paterson's less-nationalistic New Jersey plan. Though no delegate articulated the thoughts precisely, it is easy to see this sequence as an attempt to balance the need for federal supremacy against the need to reassure the states.

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<sup>81</sup> 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 76, at 150 (Dickinson motion).

<sup>82</sup> *Id.* at 152–53 (Dickinson further remarks).

<sup>83</sup> *Id.* at 150 (Sherman second).

<sup>84</sup> *Id.* at 155–56.

<sup>85</sup> *Id.* at 154–56.

<sup>86</sup> 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 76, at 21.

<sup>87</sup> *Id.* at 28.

<sup>88</sup> *Id.* at 27.

Much later, the Convention (on Rutledge's motion) substituted "laws of the United States" for "Acts of the Legislature of the United States."<sup>89</sup> But it seems extraordinarily doubtful that Rutledge or the Convention intended this change to open the door to non-Article I supreme lawmaking. There is no record in the Convention's intervening days of any discussion implicating non-Article I lawmaking. Nor is there reason to think Rutledge (a South Carolinian anxious among other matters to protect slavery from federal interference) wanted to expand supreme federal lawmaking. No one made any mention of the change. And, as discussed in the prior section, the Constitution's text as a whole continued to exclude non-Article I lawmaking. It seems most likely that Rutledge's revision was simply cutting back on words, and that the delegates did not depart from their understanding that supreme lawmaking had to pass through the state-controlled Senate.

Finally, in ratification debates, the state-protecting account of the Senate's role became an important theme countering anti-federalist fears of nationalist overreaching. The states would be protected, Alexander Hamilton told the New York ratifying convention, because the Senators would have "uniform attachment to the interests of their several states."<sup>90</sup> Similarly, Fisher Ames in the Massachusetts convention explained that Senators were "ambassadors of the states" such that the Senate represented the "sovereignty of the states" and served as a "shelter against the abuse of power" by the national government.<sup>91</sup>

In sum, the drafting and ratifying history confirms the most natural reading of the text: that Article VI refers to the Constitution, treaties, and federal statutes.

### *C. Structural and Historical Considerations*

This subsection turns to potential structural and historical objections to the textual account outlined above. Though discussed together here, these are somewhat distinct categories. Structural objections might arise if, as a matter of constitutional design or of the framers' assumptions about how the Constitution would work, Supremacy Clause textualism seems to lead to implausible results. Historical objections might arise if it appeared from post-ratification practice that strict adherence to the Supremacy Clause's text was not expected or adopted.

Although these objections are not without force, I find none sufficient to require a rethinking of the text's original meaning. With one partial exception,

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<sup>89</sup> *Id.* at 169.

<sup>90</sup> 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 306 (Jonathan Elliot ed., 1836); see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 558–59 (2d ed. 1998). As Professor Wood also emphasizes, Federalists also widely invoked the protections of bicameralism, which similarly assumed that supreme lawmaking would be done through Congress. *Id.* at 559–60.

<sup>91</sup> See PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 177–78 (2011).

none of them appears to contain any structural imperatives or deep historical roots that would undermine a strict reading of the text.

### 1. *Executive Lawmaking*

As an original matter, the President was understood as the nation's spokesperson in foreign affairs. This role, contained within the "executive Power" and fully supported by practice in the Washington administration, involved some independent authority not dependent upon congressional authorization.<sup>92</sup> If state laws conflicted with presidential foreign policy, would the former, as a matter of structural necessity or historical assumption, need to give way?

Structurally, it should be evident that there are (here as elsewhere) various ways of implementing supremacy. One might allow the President to displace state law directly, at least in areas committed particularly to the executive by the Constitution, such as foreign affairs; or one might require the President to enlist Congress's assistance to displace inconvenient state law. The text and history of Article II and Article VI strongly indicate that the framers chose the latter—principally, the description of the President as holding "executive" in contrast to "legislative" power and Article VI's focus on "Laws" as the touchstone of preemption. No structural reason demands that, nonetheless, the framers *must* have preferred the former. In a system in which (1) Congress has effective preemptive power within the scope of its authority (supplied by the Supremacy Clause), and (2) Congress's scope of authority includes carrying into effect the President's powers (supplied by Article I, Section 8),<sup>93</sup> there is no imperative that the President must have independent preemptive power. The question whether the President should be able to preempt state law directly or should be required to enlist Congress's assistance (or the Senate's, via a treaty) is one of constitutional policy, having different potential solutions.<sup>94</sup> The text shows which one was chosen.

Of course, even lacking a structural imperative, concern might arise if the founding era generally reflected the assumption that presidential policy could displace conflicting state law. But nothing in founding-era debates or post-ratification practice suggests an idea of executive preemption: state laws did at times conflict with presidential policies, and state laws were not thought to be displaced as a result.<sup>95</sup>

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<sup>92</sup> See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 295 (2001); RAMSEY, *supra* note 1, at 51–131.

<sup>93</sup> Prakash & Ramsey, *supra* note 92, at 350–53.

<sup>94</sup> See Denning & Ramsey, *supra* note 28 (expanding this argument).

<sup>95</sup> Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 391–403 (1999); see also Goldsmith, *supra* note 4, at 1657–59 (discussing state foreign relations activity in the post-ratification era).

The issue of preemptive executive agreements illustrates this broader principle. While it is true that modern law recognizes preemption through executive agreements, at least in limited circumstances, this practice lacks roots in the Constitution's original meaning or early history. The Court did not recognize preemption by executive agreement until 1937, a time in which the Court was broadly expanding executive foreign affairs powers in many respects.<sup>96</sup> Although executive agreements were used as policy instruments in the nineteenth century, they had not been treated as preemptive.<sup>97</sup> At least in most cases, Congress's broad powers in international affairs would seem sufficient (even under an eighteenth-century view of such powers) to give particular executive agreements a statutory basis as needed to displace conflicting state law. A system in which the President alone can make low-level diplomatic agreements regarding matters external to the states, but requires congressional participation where state interests are involved, seems not only plausible but arguably preferable as a structural matter as a limit on presidential power.<sup>98</sup> Nothing in early post-ratification history suggests otherwise.

## 2. Federal Common Law—General Considerations

To modern ears, Supremacy Clause textualism's most jarring claim is its apparent rejection of federal common law. At the outset, the tensions between the two should not be overstated. As discussed, Supremacy Clause textualism says nothing about federal courts' ability to apply common law principles as rules of decision: its only claim is that federal courts cannot apply common law principles as rules of decision *in conflict with state law*.<sup>99</sup>

That claim is largely consistent with eighteenth- and nineteenth-century understandings of the power of federal courts. Prior to the Constitution, English courts and American state courts applied common law, including the law of nations (which itself included maritime law and international commercial law) without statutory authorization. As a general proposition, then, it seems likely that the Article III, Section 1 "judicial Power" included at least some corresponding power, although how that power would be exercised within a federal system required some working out in practice.

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<sup>96</sup> See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 113–14 (1999).

<sup>97</sup> Ramsey, *supra* note 28, at 174–85 (reviewing practice between 1789 and 1860 and finding no evidence of preemptive executive agreements).

<sup>98</sup> See Clark, *supra* note 28.

<sup>99</sup> Some broader academic attacks on federal common law appear to deny federal courts' authority to apply non-Article VI rules of decision under any circumstances. Generally, however, these claims rest more on the Court's decision in *Erie* than upon the Constitution's original meaning. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). For further discussion and a powerful argument that *Erie* does not require this view, see Green, *supra* note 50.

As an initial matter, the 1789 Judiciary Act provided that absent a constitutional provision, treaty, or federal statute, federal courts “in trials at common law” would use state law as a rule of decision “where [it] appl[ied].”<sup>100</sup> The Act seemed to acknowledge both the Supremacy Clause and its negative implication—that state law would be displaced where it conflicted with the sources of law listed in the Clause, but not otherwise. But the Act also appeared to contemplate that state law would not always “appl[y],” and it did not specify what would happen in such cases.<sup>101</sup>

Faced with such cases, federal courts quickly and without discussion assumed they could use rules of decision drawn from outside both state law and Article VI supreme law. The issue first arose in admiralty cases involving seizures of ships by French privateers in the early 1790s. The seizures occurred outside the boundaries of any state and did not implicate state law; no federal statutory law governed, and yet federal courts appeared to have jurisdiction under both the Constitution and the Judiciary Act. In *Glass v. Sloop Betsey* in 1794 the Court assumed the law of nations could supply a rule of decision,<sup>102</sup> and a year later in *Talbot v. Janson* a majority of Justices relied on the law of nations (as well as a treaty) to decide the case.<sup>103</sup> The Justices must have assumed that Article III’s “judicial Power” allowed them to apply the law of nations—a point entirely consistent with the Constitution’s text. As discussed above, federal courts of the time did not understand themselves to be “making law” (that is, acting legislatively), but rather applying rules of decision found in an external source (in this case, the law of nations), so there was no tension with Article I, Section 1; and they were not displacing state law, so there was no tension with the Supremacy Clause. By the early nineteenth century federal courts routinely applied the law of nations and international commercial and maritime law in the absence of state statutory law.<sup>104</sup> At the same time, in

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<sup>100</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92.

<sup>101</sup> See *id.*

<sup>102</sup> 3 U.S. (3 Dall.) 6, 16 (1794) (finding jurisdiction and directing district court on remand “to decide, whether, in the present case, restitution ought to be made to the claimants . . . (that is whether such restitution can be made consistently with the law of nations and the treaties and laws of the United States)”).

<sup>103</sup> 3 U.S. (3 Dall.) 133, 169 (1795).

<sup>104</sup> Indeed, the Constitution seems directly to contemplate this power, because it gives federal courts jurisdiction over admiralty and maritime cases without indicating what rules of decision to apply. In eighteenth-century understanding these cases generally arose on the high seas, to which state law likely would not extend. Of course, Congress could supply a statutory rule of decision, but that would establish jurisdiction arising under federal law. The constitutional grant of admiralty jurisdiction thus seems to assume federal courts could decide cases to which neither state nor federal rules of decision would extend. See RAMSEY, *supra* note 1, at 356–58; Strauss, *supra* note 2, at 1569–70.

Professor Strauss argues that this early practice undermines Supremacy Clause textualism:

Article III as well clearly imagines “Law” that is made without Senate participation. The grants to the Supreme Court of original jurisdiction over the states and to federal

commercial law cases in which state statutory law clearly governed, federal courts applied it,<sup>105</sup> even where the statute sharply departed from the federal courts' understanding of general common law<sup>106</sup> and even where transnational parties and events were involved.<sup>107</sup>

The more difficult question was what federal courts should do in the face of an applicable state common law decision. Building on *Glass* and *Talbot*, federal courts gradually asserted a right to disagree with state courts' common law decisions, especially in international commercial and maritime cases.<sup>108</sup> This practice, which at first went largely unremarked, famously received the Supreme Court's express imprimatur in *Swift v. Tyson*, in which the Court refused to follow New York courts' common law rules regarding international bills of exchange.<sup>109</sup>

Courts in common law cases, Justice Joseph Story explained in *Swift*, did not ordinarily conceive their role as making or applying the law of a particular jurisdiction. Rather, they saw themselves engaged in a collective enterprise to "find" a general law that applied across jurisdictions throughout the common law world. A state court's exposition of common law—except in purely "local" matters such as title to real estate—was not a declaration of the state's law, but rather an opinion regarding the content of this "general" law. As a result, other courts (especially federal courts in diversity cases) were not bound by state courts' views of general law: the state courts' views might be persuasive, but no more. That was so, Story thought, even in light of the Judiciary Act, because the Act's reference to "state law" did not encompass state courts' common law decisions: these decisions were opinions on general law, not declarations of

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courts generally of jurisdiction in admiralty presuppose judge-made law that will have purchase without the Senate ever having a participatory chance. . . . [T]he Founders understood that in creating courts, they were creating bodies capable of acting in ways that would impose obligations on parties properly brought before them.

This analysis errs on two grounds. First, it describes common law as "judge-made," which, as discussed, the framers would not have. Because this law was not "made," it did not come within the Supremacy Clause's text. Further, and most importantly, this law was (with an exception noted *infra*) not preemptive. If it had been, it would pose a serious puzzle for the Supremacy Clause. But because it was not, they are easily reconciled: again, Supremacy Clause textualism, properly and narrowly understood, does not deny the existence of non-Article VI law; it denies the existence of *preemptive* non-Article VI law.

<sup>105</sup> *E.g.*, *Brashear v. West*, 32 U.S. (7 Pet.) 608 (1833); *Kirkman v. Hamilton*, 31 U.S. (6 Pet.) 20 (1832).

<sup>106</sup> *Bank of the U.S. v. Tyler*, 29 U.S. (4 Pet.) 366, 382 (1830) (enforcing Kentucky statute regarding assignees' duties even though it "carr[ied] the doctrine of diligence to an extent unknown to the principles of the common law").

<sup>107</sup> *D'Wolf v. Rabaud*, 26 U.S. (1 Pet.) 476, 499–500 (1828) (applying New York statute of frauds to resolve enforceability of international commercial agreement between U.S. citizen and French citizen).

<sup>108</sup> William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

<sup>109</sup> 41 U.S. (16 Pet.) 1, 18–22 (1842).



state law.<sup>110</sup> On *Swift*'s merits, Story rejected the New York courts' view of the law of bills of exchange (New York being the state where the dispute originated), and instead articulated a distinct federal rule.<sup>111</sup>

*Swift*'s conclusion seems constitutionally defensible, given the assumptions of the time. State courts in the early nineteenth century often did think of themselves as finding and applying a "general" law in common law cases that was different from state law. That view was especially appropriate and understandable in cases like *Swift* itself: the common law of bills of exchange was an aspect of international commercial law, understood as part of the "law merchant" (*lex mercatoria*) that applied to commercial transactions regardless of their location; it was often described as a branch of the law of nations. In Story's words, "[t]he law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the commercial world."<sup>112</sup>

Crucially for the present discussion, and regardless of its constitutionality, *Swift* disclaimed power to override state statutes,<sup>113</sup> and to the extent it claimed power to override state common law, that claim was premised on the assumption that state courts themselves were applying general common law, not a distinctive law of the state. Indeed, recognizing that state common law *could* be a reflection of localized state law, *Swift* affirmed that *in such cases* the state rule would bind the federal court.<sup>114</sup>

Consequently, there is no conceptual tension between the Supremacy Clause's text and federal courts' common law powers as the latter were understood in the eighteenth and early nineteenth centuries. Although federal courts applied non-Article VI common law, that law was not preemptive of state law, and so did not implicate the Supremacy Clause.

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<sup>110</sup> *Id.* at 18–19.

<sup>111</sup> *Id.* at 19–20. Note that, by comparable reasoning, *Swift*'s "federal" rule would not bind future New York courts on the same matter, because the "federal" rule was—like the "New York" rule—just an opinion on the content of general law. See, e.g., *Pa. R.R. Co. v. Hughes*, 191 U.S. 477, 486 (1903) (making this point).

<sup>112</sup> *Swift*, 41 U.S. at 19. Though reasonable at its inception, the *Swift* system overreached in the late nineteenth century. State courts came more to think of themselves as applying a common law *of the state*, even outside the narrow sorts of common law cases Story had identified as purely "local." Federal courts in diversity cases increasingly applied general common law to subjects that, unlike *Swift*'s commercial law, had less obvious bases in general as opposed to local law, such as torts, insurance, and punitive damages. See Clark, *Federal Common Law*, *supra* note 1, at 1290–92; Bellia & Clark, *supra* note 46.

<sup>113</sup> See *Swift*, 41 U.S. at 18. The post-*Swift* Court apparently allowed common law to displace state statutory law in *Watson v. Tarpley*, 59 U.S. (18 How.) 517, 519–21 (1856), which refused to apply a Mississippi statute restricting when suit could be brought on a negotiable instrument. *Watson* seems an anomaly however: post-Civil War cases returned to the view that federal courts were bound by state statutes in commercial law cases, and the Court subsequently described *Watson*'s conclusions as dicta that had not been followed. See *Burns Mort. Co. v. Fried*, 292 U.S. 487, 494–95 & n.8 (1934).

<sup>114</sup> *Swift*, 41 U.S. at 18.

### 3. Federal Common Law—Specific Instances

While, as set forth above, the general idea of common law in federal courts poses no challenge to Supremacy Clause textualism, it may be that particular categories of subject matter raise specific structural or historical challenges. This section considers the leading specific categories.<sup>115</sup> The question, again, is not whether federal common law is structurally or historically compelled, but whether preemptive law that does not arise from Article VI sources is structurally or historically compelled.<sup>116</sup>

#### a. Foreign Affairs

Potentially the broadest category of modern federal common law is the suggestion of a federal common law of foreign affairs. The general idea, reflected in the Court's 1964 *Sabbatino*<sup>117</sup> decision, is that issues implicating national foreign policy may require national solutions and federal courts should have common law power to displace state law where appropriate to protect against local interests and prejudices.<sup>118</sup>

At this point, our concern is whether the structural imperatives underlying a federal common law of foreign affairs require re-thinking the strictly textual approach as a matter of original understanding. One response might be, as Professor Clark has argued, that there is no conflict between the two. If the Constitution itself prevents states from acting in areas affecting foreign policy,<sup>119</sup> or if it empowers federal courts to implement common-law rules (as, in *Sabbatino*, the act of state doctrine) to protect the executive branch's foreign affairs powers,<sup>120</sup> the two principles are reconcilable; all that is required is to describe decisions such as *Sabbatino* as arising directly from the Constitution. (It is true that *Sabbatino* denied that its decision arose directly from the Constitution, but it acknowledged "constitutional underpinnings"<sup>121</sup> and perhaps it was being unduly cautious.)

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<sup>115</sup> See Tidmarsh & Murray, *supra* note 4, at 594 (identifying four traditional "enclaves" of federal common law as "(1) cases affecting the rights and obligations of the United States (typically, but not always, when the United States is a party), (2) interstate controversies, (3) international relations, and (4) admiralty").

<sup>116</sup> As noted, here and in later discussions I address only federal common law that does not have an Article VI source.

<sup>117</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>118</sup> Tidmarsh & Murray, *supra* note 4, at 600–02; see *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (listing "international disputes implicating . . . our relations with foreign nations" as a category of federal common law); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 (1987) (describing international law as an aspect of preemptive federal common law).

<sup>119</sup> Clark, *Federal Common Law*, *supra* note 1, at 1292–1311.

<sup>120</sup> See Bellia & Clark, *supra* note 60, at 84–90 (making this argument).

<sup>121</sup> *Sabbatino*, 376 U.S. at 423.

Nonetheless, despite Professor Clark's notable work, if the federal common law of foreign affairs is described broadly, it does not seem reconcilable with Supremacy Clause textualism as a matter of original understanding. First, there is little evidence that the Constitution as originally understood generally precluded states from foreign affairs activities. Article I, Section 10 precludes states from specified foreign affairs activities, an approach that is difficult to reconcile with an implicit general preclusion.<sup>122</sup> Evidence of framers' intent, sometimes invoked in support of a general preclusion, turns out on closer examination not to address the question.<sup>123</sup> And post-ratification practice affords little if any support for the idea.<sup>124</sup> (Even the modern Court's largely unexplained endorsement in *Zschernig v. Miller*<sup>125</sup> has been sharply criticized and not repeated.)<sup>126</sup>

In important recent articles, Professor Clark and Professor Anthony Bellia offer a narrower and more plausible account.<sup>127</sup> In this view, the Constitution's separation-of-powers structure incorporates basic doctrines drawn from the eighteenth-century law of nations, including its immunities, to protect the foreign affairs prerogatives of the political branches. Thus foreign sovereign immunity, for example, reflects the idea that the President, not the courts, should seek redress for misdeeds of foreign sovereigns. In the Bellia/Clark account, this "federal common law of nations," authorized by the Constitution, was developed in a series of early cases such as *The Schooner Exchange v. McFaddon*,<sup>128</sup> and continued into the modern era to support cases such as *Sabbatino*.<sup>129</sup>

Although there are important insights in the Bellia/Clark position, it also does not appear satisfactorily to resolve the Supremacy Clause issues. In particular, there is no material evidence that federal courts in the immediate post-ratification era, or indeed at any time prior to the mid-twentieth century, thought law-of-nations doctrines such as foreign sovereign immunity or the act of state doctrine displaced positive (statutory) state law. To the contrary, these doctrines were applied, like other common law/law-of-nations principles, as

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<sup>122</sup> See Goldsmith, *supra* note 4, at 1643 (making this point).

<sup>123</sup> Ramsey, *supra* note 95, at 379–90.

<sup>124</sup> Goldsmith, *supra* note 4, at 1643–63; Ramsey, *supra* note 95, at 403–29.

<sup>125</sup> 389 U.S. 429, 432 (1968) (holding that a state's "intrusion" into foreign affairs was unconstitutional without explaining the constitutional basis for the decision).

<sup>126</sup> For criticism, see Ramsey, *supra* note 95; Goldsmith, *supra* note 4. Professor Clark once grounded his broad suggestion on *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), which argued for an extra-constitutional exclusion of states from foreign affairs. See Clark, *Federal Common Law*, *supra* note 1, at 1296. *Curtiss-Wright's* history is seriously flawed, however, see RAMSEY, *supra* note 1, at 13–48, and in later writings Professor Clark seems to have retreated from this position. See Bellia & Clark, *supra* note 60 (adopting a narrower view of foreign affairs preemption).

<sup>127</sup> Bellia & Clark, *supra* note 60; Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729 (2012).

<sup>128</sup> 11 U.S. (7 Cranch) 116 (1812).

<sup>129</sup> See Bellia & Clark, *supra* note 60.

“general” common law under the *Swift* system. That is, federal courts applied them in cases where there was no conflicting state law, but there is little suggestion that they were seen as preemptive aspects of federal law. It appears that the first case to find a “federal common law of nations” capable of overriding state law was *Sabbatino* itself.<sup>130</sup> Similarly, Bellia and Clark do not point to statements from the founding era indicating a consensus view that states would be constitutionally precluded from adjudicating matters affecting foreign sovereign acts. Thus, while Bellia and Clark offer a useful modern explanation for *Sabbatino*, it is not clear that they can resolve the tension between the Supremacy Clause and the federal common law of foreign affairs as an original matter (particularly if the federal common law of foreign affairs is thought to have broad scope).

This conclusion returns us to the question whether the federal common law of foreign affairs is a structural necessity that cannot be disregarded (and thus that the pure textual theory of the Supremacy Clause must give way). At least in its narrow version, encompassing foreign sovereign immunity and the act of state doctrine, the question should give us pause. Is it plausible that the Constitution’s framers, who were undoubtedly concerned about states’ violations of the law of nations, would allow states to violate law-of-nations immunities without constitutional recourse?<sup>131</sup>

Put this way, the answer is surely no. But to say that the framers must have envisioned some constitutional solution is not to say that they must have envisioned unmoored displacement of state law by federal courts. The Constitution provides a different set of remedies. First, Article III directs much litigation in which immunity-related questions might arise into federal court, as a matter of diversity jurisdiction, admiralty, or matters affecting ambassadors. Under the *Swift* system, federal courts would not be bound by immunity-related conclusions of state common law courts, so only state statutes overriding law-of-nations immunities would pose difficulties. Second, Article I, Section 8 expressly gave Congress power to enforce the law of nations. Using this power, Congress could override any such state statute. This combination provides a constitutional solution: it is hard to imagine how state violations of immunity, if problematic, would persist. Finally, with regard to immunity, as a practical matter the issue may have appeared less momentous at the time: aside from ambassadors and ships, the conditions of the time left few avenues for such disputes to arise; indeed, there were few immunity disputes in the decades following ratification, and generally these were handled adequately through the constitutional mechanisms indicated above without need for a preemptive federal common law of foreign affairs. As a result, the need for a preemptive

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<sup>130</sup> See Tidmarsh & Murray, *supra* note 4, at 599 (treating *Sabbatino* as lacking direct precedent and observing that it “announced a third area controlled by federal common law”).

<sup>131</sup> See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1856 (1998) (arguing the need for federal court intervention in foreign affairs cases).

common law of immunity does not appear to be a structural imperative as a matter of original understanding.

The Constitution's solution to one of the Articles' pressing problems—ambassadors' immunities—provides a confirming illustration. Under the Articles, violations of ambassadors' immunities raised serious complications for Confederation diplomacy. The most celebrated incident involved Charles Julian de Longchamps's assault on the French diplomat Marbois in Philadelphia, although there were others as well.<sup>132</sup> The Articles' Congress had little ability to respond to these challenges, as it acknowledged in connection with the Longchamps/Marbois incident.<sup>133</sup> Undoubtedly the framers had this particular issue in mind in designing the Constitution. Yet the Constitution did not directly provide ambassadorial immunity. Instead, it provided two remedies: first, it gave federal courts jurisdiction over cases "affecting ambassadors," and second it gave the new Congress the power (which the Articles' Congress lacked) to pass laws to "define and punish" law-of-nations violations. Acting pursuant to that power, Congress in the 1790 Crimes Act provided punishment for violating ambassadorial immunities.<sup>134</sup> Violations ceased to be a problem, without any need for preemptive federal common law.<sup>135</sup>

There seems no overriding reason to suppose the framers expected issues of foreign sovereign immunity to be handled any differently. The leading immunity case in the post-ratification era, *The Schooner Exchange*, arose in federal court under the federal courts' constitutionally and statutorily granted admiralty jurisdiction; the Supreme Court then found immunity (at the strong behest of the executive branch) as a matter of interpreting the relevant federal statute.<sup>136</sup> Had a state statute attempted to deny immunity in such cases, no doubt the executive branch would have strongly encouraged Congress to codify foreign sovereign immunity—as the executive branch ultimately did, for different reasons, in the 1970s. The fact that the issue did not arise in the post-ratification period tends strongly to counter suggestions that a preemptive federal common law rule was a structural necessity.

#### b. Admiralty

Admiralty and maritime law poses a similar set of challenges, resolvable in a similar way. Article III's creation of federal admiralty jurisdiction provided a way to assure that admiralty disputes would generally go forward in federal court. Under the *Swift* system, that meant that the federal courts' version of general maritime law (understood as part of the law of nations) would apply, at

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<sup>132</sup> RAMSEY, *supra* note 1, at 38–39, 43–44.

<sup>133</sup> See 27 JOURNALS OF THE CONTINENTAL CONGRESS 478 (Worthington Ford et al. eds., 1906–1937).

<sup>134</sup> Crimes Act of 1790, ch. 9, 1 Stat. 112, 117–18.

<sup>135</sup> Clark, *Federal Common Law*, *supra* note 1, at 1314–16.

<sup>136</sup> *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (applying the interpretive canon that ambiguous statutes should not be read to violate the law of nations).

least unless a state statute purported to govern the dispute.<sup>137</sup> As a practical matter, the result was that federally generated common law did effectively shape admiralty law throughout the late eighteenth and nineteenth centuries,<sup>138</sup> but this did not depend upon non-Article VI preemption.

It was not until the early twentieth century that growing state codification of matters touching on admiralty, coupled with the mid-nineteenth-century judicial broadening of admiralty jurisdiction,<sup>139</sup> raised a series of conflicts between state statutes and federally developed maritime common law. When this happened, the Supreme Court produced a confused and divided response, ultimately holding by a narrow majority in *Southern Pacific Co. v. Jensen* that the common law of admiralty overrode state statutory law where the two were substantially in conflict or the former required uniformity.<sup>140</sup> The dissenters decried this decision as novel and unsound.<sup>141</sup> Nor did Congress appear to think federal courts' control of admiralty law was essential: it promptly overrode *Jensen* by statute, giving states authority to legislate in admiralty matters (only to have the Court find the federal statute unconstitutional).<sup>142</sup> At the same time, Congress's foreign commerce and law-of-nations powers allowed it to pass wide-ranging supreme statutory law where it thought uniformity and other federal interests predominated.<sup>143</sup> Given these developments it is hard to see a structural necessity for preemptive common law in admiralty, even in the 1920s when it first arose.

It is true that admiralty provides a slightly better textual ground than foreign affairs for preemptive federal common law. As the majority argued in *Jensen*, perhaps the constitutional and statutory grants of admiralty jurisdiction carried

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<sup>137</sup> The 1789 Judiciary Act appeared to contemplate some concurrent state role. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (making federal jurisdiction exclusive but “saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it”); see also Tidmarsh & Murray, *supra* note 4, at 602–07.

<sup>138</sup> See generally David J. Bederman, *Customary International Law in the U.S. Supreme Court, 1861–1900*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 89 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (discussing the evolution of general maritime law in the late nineteenth century). Generally, state law did not apply, either because the dispute arose outside the boundaries of any state, see, e.g., *The Paquete Habana*, 175 U.S. 677 (1900) (adjudicating legality of ship seizures during blockade of Cuba), or because there was no state statutory law and under *Swift* state common law decisions on general matters were not regarded as law of the state.

<sup>139</sup> *New England Mut. Marine Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1870); *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

<sup>140</sup> 244 U.S. 205, 216 (1917) (displacing state law that “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations”); see Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 291–306 (1999).

<sup>141</sup> *Jensen*, 244 U.S. at 225–26 (Pitney, J., dissenting).

<sup>142</sup> *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163–64 (1920).

<sup>143</sup> See, e.g., Harter Act, ch. 105, 27 Stat. 445 (1893); Pomerene Act, ch. 415, 39 Stat. 538 (1916); Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936); see also GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 73–86 (1997).

with them implied power to develop common law that displaced state statutory law. But as the dissenters responded, nothing in Article III said as much, and no one thought the parallel grant of diversity jurisdiction carried a similar implied power (indeed, *Swift* and the 1789 Judiciary Act reflected exactly the opposite assumption). In eighteenth-century thought, maritime law (as applied in *Jensen*) and international commercial law (as applied in *Swift*) were grouped together as the private aspects of the law of nations, as Blackstone's treatment of them reflected.<sup>144</sup> It is hard to see why the framers would have understood one to be preemptive of state statutes and the other not to be. *Jensen*, in short, seems more a product of a willful Court than either a fair reading of the text's historical meaning or an implementation of a genuine structural necessity. In any event, like *Sabbatino*—the fountainhead of the federal common law of foreign relations—*Jensen* is a twentieth-century product casting little light upon eighteenth-century meaning.

### c. Interstate Disputes

The law governing disputes between states poses the most difficult structural and historical challenge to Supremacy Clause textualism. Article III gives federal courts jurisdiction over interstate disputes but does not say what law governs them. The framers no doubt supposed that many disputes would be governed by federal treaties or statutes, as indeed they were. But not all would be, and the Constitution appears not expressly to supply a rule of decision in such cases. Further, the possibility of conflict does not seem remote: state statutes might frequently purport to govern such disputes, and indeed the disputes could well involve two conflicting state statutes. In these circumstances, federal courts, though having jurisdiction, might have no way to resolve the dispute.

The issue arose in the Supreme Court in the mid-nineteenth century in a boundary dispute between Massachusetts and Rhode Island. An agreement between the two described the boundary, but a subsequent survey placed the border some seven miles further south (into Rhode Island) than it should have been. Massachusetts extended its authority into the disputed area, but many years later, after the Constitution was ratified, Rhode Island brought a claim to restore the boundary specified in the agreement.<sup>145</sup> Massachusetts argued that Rhode Island had waived its rights by failing to assert them, and in addition raised a more formidable challenge. No source of law existed, it argued, superior to Massachusetts law by which the Court could decide the case. Massachusetts conceded that a federal treaty or statute would override its claims, but as none was available, the Court was (Massachusetts claimed) unable to overturn a state statute. Its position, in short, was that Supremacy Clause textualism prevented the Court from deciding at least some interstate

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<sup>144</sup> 4 BLACKSTONE, *supra* note 68, at 67–73.

<sup>145</sup> *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

disputes even where the Constitution gave it jurisdiction, because there would be no supreme law to displace state law.<sup>146</sup>

The Court firmly rejected that view, concluding that it could use common law and international law principles to override Massachusetts law (and in a later phase of the case it did rule against Massachusetts).<sup>147</sup> The Court did not explain how it found constitutional authority to do so. Apparently it concluded that by assigning courts jurisdiction over interstate disputes, the Constitution's framers intended courts to have authority to make final adjudications even absent a textually supreme source of law. As the Court reaffirmed in *Kansas v. Colorado* at the beginning of the twentieth century, in interstate cases it applied "interstate common law."<sup>148</sup>

This approach resembles the one the Court later adopted for admiralty in *Jensen*, and is subject to similar objections. But unlike *Jensen*, the *Massachusetts* case may present a true structural imperative. Reading the Clause strictly seems not to allow federal courts to override state law (as Massachusetts argued), yet adopting that position would leave a substantial gap in federal courts' ability to resolve interstate disputes (a role the framers obviously contemplated). Further, unlike admiralty and foreign relations, the difficulties here may not be fully resolvable through Congress's legislative power. Under the original understanding of Congress's commerce power, Congress's power might not extend to the subject matter of all interstate disputes. In *Kansas v. Colorado*, for example, the Court held that Congress lacked power to legislate with respect to an interstate water dispute.<sup>149</sup> Congress had power to approve interstate compacts,<sup>150</sup> and arguably a congressionally approved compact would preempt inconsistent state law. But some disputes—presumably the most difficult ones—would not be resolvable by compact. And even where Congress could claim enumerated power, construing the Constitution to give resolution of interstate disputes to Congress seems problematic. The Articles' Congress had this power expressly,<sup>151</sup> and it had not been thought a success. The Constitution's failure to grant Congress this power directly, and instead its apparent assumption that the Supreme Court would become the forum for resolving interstate disputes, makes it odd to think that the Court's resolution power might ultimately depend on Congress.

There are at least three responses, none entirely satisfactory. First, one might argue that the Constitution gives federal courts lawmaking authority in interstate disputes as a structural necessity. That appears to be the unarticulated basis of decisions such as *Rhode Island v. Massachusetts* and *Kansas v.*

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<sup>146</sup> *Id.* at 675 (argument of counsel).

<sup>147</sup> *Id.* at 749; see *Rhode Island v. Massachusetts*, 40 U.S. (15 Pet.) 233, 272–73 (1841).

<sup>148</sup> 206 U.S. 46, 98 (1907).

<sup>149</sup> *Id.* at 85–94.

<sup>150</sup> U.S. CONST. art. I, § 10.

<sup>151</sup> ARTICLES OF CONFEDERATION of 1781, art. IX, § 2.



*Colorado*.<sup>152</sup> In this view, interstate disputes are an exception to the rule that supreme law can come only from Article VI. However, this view seems problematic in that it is not clear why interstate disputes, and not other issues of federal significance, convey constitutionally authorized lawmaking authority. And if such lawmaking authority is recognized more broadly, it would undermine the strictness of Supremacy Clause textualism (just as Professor Monaghan argues).

A second possibility is that the framers had the view expressed by Massachusetts in the *Rhode Island* case, namely that interstate disputes would in fact be irresolvable in court in the absence of a treaty, statute, or constitutional provision. Perhaps they believed disputes, if they did not turn on a treaty, would be resolved by Congress (or by a compact between the disputing states, approved by Congress). As discussed, there are structural and contextual reasons to doubt this view, but there is no direct evidence against it. And indeed, no less a figure than Oliver Wendell Holmes appeared to endorse it. In *Missouri v. Illinois* in 1906, Holmes, writing for the Court, rejected a complaint by Missouri that Illinois was wrongfully polluting the Mississippi River: in the absence of a federal statute, “[t]he only ground on which [a] State’s conduct can be called in question,” he wrote, “is one which must be implied from the words of the Constitution.”<sup>153</sup> Holmes acknowledged that the Court had jurisdiction under Article III over interstate controversies, and “[t]herefore, if one state raises a controversy with another, this court must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover.”<sup>154</sup> But, he added pointedly, “the fact that this court must decide does not mean, of course, that it takes the place of a legislature.”<sup>155</sup>

A third possibility is that the framers did not appreciate the problem. Assuming that the framers had a view of common law similar to the one expressed in *Swift*, they may have believed that general common law would typically govern interstate disputes in the absence of a federal treaty or statute. For example, at the beginning of the twentieth century a dispute between Tennessee and Arkansas arose when the Mississippi River, which formed the boundary between them, altered its course. At the Supreme Court, both states appealed to the customary law of river boundaries (which they interpreted differently) and other equitable principles to support their claim.<sup>156</sup> In deciding the case, especially in light of *Swift*, the Court did not appear to be displacing positive state law, but rather (as in *Swift*) resolving a dispute over general law.

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<sup>152</sup> *E.g.*, *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (“[D]isputes between [states] must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of Government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes.”).

<sup>153</sup> 200 U.S. 496, 519 (1906).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* A year later in *Kansas v. Colorado*, the Court—despite the *Missouri* holding—reaffirmed its ability to apply common law to interstate disputes. 206 U.S. at 98.

<sup>156</sup> *Arkansas v. Tennessee*, 246 U.S. 158, 164–69 (1918).

The fact that states were parties did not make the dispute any less governed by general law.

But even if this view could somewhat reduce the size of the problematic category, ultimately it could not finesse the supremacy question: states could—as Massachusetts did in the *Rhode Island* case—affirm their claims by statute. And if they did, the Court would be forced to choose between finding a supreme rule of decision not reflected in Article VI law and finding no rule of decision. Given the absence of reflective discussion of the issue, it may be that the framers simply did not recognize the problem, and thus that the Constitution contains a flaw in this regard. We should not regard the Constitution as necessarily perfect, such that every apparent imperfection in the text must be resolved through an implication from structural necessity. If the matter is one the framers might not have confronted, we should not necessarily hesitate to find the structure they designed to contain errors. The critical point here is that no historical materials from the founding era suggest an assumption that courts would have common law power to override state statutes in interstate disputes. Thus the theory of “framers’ oversight” is at least as plausible as an implication from structural necessity.

#### d. *Rights and Obligations of Federal Officials and Institutions*

The final principal category in modern federal common law is the liability of federal institutions and officials. This category does not appear to pose a substantial challenge to Supremacy Clause textualism for two reasons. First, at least some cases in this category make an extraordinarily weak case for federal court intervention. *Clearfield Trust*, one of the earliest modern cases in this line,<sup>157</sup> concerned the time limit within which the United States, as drawer of a check, had to give notice of a forged endorsement.<sup>158</sup> The Court objected that it would be inconvenient to determine the matter by state law, as that would subject U.S. agencies to differing rules in the various states.<sup>159</sup> It is unclear, however, why U.S. agencies should not be treated as ordinary commercial actors when they act in commercial capacities; private commercial enterprises face exactly the same divergences in state law when they act across state lines with no insurmountable difficulties. Moreover, Congress could obviously override state law and provide a uniform rule for such obligations if it chose.

On the other hand, where the case for structural necessity is stronger, there is correspondingly a better case that preemption arises not from federal common law but from the Constitution or a federal statute. Chief Justice Marshall famously found in *McCulloch v. Maryland* that federal institutions had immunity from state tax law (finding that the power to tax is the power to

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<sup>157</sup> See Tidmarsh & Murray, *supra* note 4, at 594–95 (treating *Clearfield* as “seminal”).

<sup>158</sup> *Clearfield Trust Co. v. United States*, 318 U.S. 363, 364–66 (1943). *Clearfield*, the defendant, argued that the United States had, under Pennsylvania law, unreasonably delayed giving notice of forgery.

<sup>159</sup> *Id.* at 367.

destroy, and that the state could have no power to destroy federal institutions).<sup>160</sup> Presumably parallel arguments could be made regarding state regulation more broadly: regulations of federal officers or institutions that threaten to prevent pursuit of constitutional duties might be constitutionally or statutorily displaced. By this reasoning, for example, the modern doctrine of executive immunity is said to arise from constitutional imperatives that the President be able to perform constitutional duties.<sup>161</sup> These do not appear to be matters of preemptive federal common law (or at least they were not considered so in the post-ratification era).

#### e. Conclusion

In sum, the leading categories of modern federal common law do not pose substantial challenges to Supremacy Clause textualism as a matter of the Constitution's original meaning. For the most part, they reflect structural convenience rather than structural necessity. The Constitution's text gives Congress power to displace state laws to the extent state laws interfere with federal interests. Of course, it may be inconvenient for Congress to intervene, but that is not sufficient reason to say the Constitution must require otherwise. Further, for the most part these categories do not have longstanding antecedents. We seem to have gotten along well enough without them throughout the nineteenth century; *Sabbatino*, *Jensen*, and *Clearfield Trust* are twentieth-century innovations without material historical roots. To be sure, that is in part because the *Swift* system, and the general low level of codification at the state level, meant that such issues arose infrequently in the nineteenth century: state statutes were not widespread, and only state statutes raised preemption questions under *Swift*. But that reinforces, rather than undermines, the case against these doctrines as an original matter.

As noted, there are two exceptions, one more easily managed than the other. The first involves state statutes regulating federal institutions and officers. One might say that this category is easily resolvable by Congress, which could displace state statutes when creating the institutions or offices. However, early experience, reflected in *McCulloch*, indicates that the post-ratification era was particularly concerned about this conflict and saw some need for judicial intervention to resolve it. *McCulloch* further shows, though, that judicial intervention was justified not by appeal to preemptive common law, but by broadly reading federal statutes (or the Constitution) to imply immunity. Cast in this way, concerns over state interference with federal actors and institutions do not challenge a textual reading of the Supremacy Clause.

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<sup>160</sup> 17 U.S. (4 Wheat.) 316, 425–36 (1819).

<sup>161</sup> See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). *Nixon* involved a claim under the Constitution, but presumably parallel reasoning would prevent state law claims. See also *Clinton v. Jones*, 520 U.S. 681, 697–706 (1997) (using similar analysis for claims arising in part under state law, but ultimately finding the particular claims not precluded).

The stronger challenge arises from interstate disputes. Here nineteenth-century practice does indicate that common law developed by federal courts could displace state statutes. Further, the argument from structural imperative is more powerful, both because it is not clear Congress would have power to intervene and because the Constitution indicates a preference for courts, rather than Congress, resolving such disputes. Supremacy Clause textualism must proceed either on the proposition that the Constitution itself authorized judicial intervention against the states in this category,<sup>162</sup> or that the framers (probably inadvertently) created a class of interstate disputes in which federal courts would have jurisdiction but no rule of decision.

#### 4. *Non-self-executing Treaties*

A final problematic category is non-self-executing treaties. Here the Supremacy Clause appears to mandate preemption and yet in modern practice state law is not uniformly displaced.<sup>163</sup> The Supremacy Clause states that “all Treaties” are supreme law of the land, but the modern doctrine of non-self-executing treaties insists that some treaties are not judicially enforceable without further implementing action by Congress.<sup>164</sup>

Non-self-execution is a conundrum that warrants its own separate treatment.<sup>165</sup> However, we may briefly sketch a limited form of non-self-execution that conforms to the Supremacy Clause’s text, structural imperatives, and post-ratification practice. In brief, non-self-execution might arise from the treaty’s content or from a superior rule of U.S. law.<sup>166</sup> In either case, non-self-execution would not contradict (and indeed would be compelled by) the Clause’s text and original meaning.

This sketch begins with the basic proposition that a treaty is a contract between nations. Its content is, therefore, what the treaty parties agreed, as reflected in its text. It is possible that the treaty’s text itself says directly that it

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<sup>162</sup> See Clark, *Federal Common Law*, *supra* note 1, at 1322–31 (arguing that the Constitution’s equality of states supports preemptive judicial decision-making in interstate disputes).

<sup>163</sup> Monaghan, *supra* note 2, at 765–66 (finding that “[t]reaties simply have not been accorded the status, in practice, that the text of the Supremacy Clause apparently mandates”). Professor Monaghan also finds inconsistency in the claim that the President might have constitutional power to violate treaties despite the President’s constitutional duty to “take Care that the Laws be faithfully executed.” *Id.* at 766. On this point I think he is correct: Supremacy Clause textualism does require that the President not violate treaty obligations (else the President would have power to displace supreme law). See Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1225–36 (2005). However, despite the claims of some executive power advocates, see *id.* at 1228 (quoting a 2002 Justice Department memorandum), there is no entrenched modern law recognizing such a presidential power nor strong textual, historical, or structural support. *Id.* at 1231–36.

<sup>164</sup> *Medellin v. Texas*, 552 U.S. 491, 504–06 (2008).

<sup>165</sup> For comprehensive discussion, see generally Vázquez, *supra* note 13.

<sup>166</sup> See *id.* at 601–02.

is non-self-executing. That is, the parties might expressly agree that the United States's only treaty obligation is for Congress to enact implementing legislation.<sup>167</sup> If that is what the treaty says, the only obligation that the Supremacy Clause makes supreme law is the obligation to enact—an obligation of Congress, not of the courts.<sup>168</sup> Thus a suit asking a court to displace a state law conflicting with the treaty (or otherwise to enforce a provision of the treaty) could not invoke the Supremacy Clause. Indeed, the Clause would not allow courts to enforce the treaty's provisions directly, because none of the provisions (other than the obligation to enact implementing legislation) would in themselves represent supreme law.

This account of non-self-execution is the conventional explanation of *Foster v. Neilson*, the Court's seminal 1829 non-self-execution case.<sup>169</sup> Chief Justice Marshall's opinion read the relevant treaty to say that certain land grants "shall be confirmed" by the United States, and he understood (for reasons not entirely clear) that to be an obligation directed to Congress. Congress had not acted, so the Court had nothing to enforce as between the parties to the case (the only obligation arising from the treaty being an obligation of Congress).<sup>170</sup>

Although plain enough in theory, non-self-execution of this type may not frequently occur. Many treaties do not address how their parties should

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<sup>167</sup> See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 244 (1796) (opinion of Chase, J.) ("No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature . . ."). The 1783 Treaty of Peace with Britain, U.S.–Gr. Brit., art. 5, Sept. 3, 1783, 8 Stat. 80, 82–83, provided that "Congress shall earnestly recommend" that state legislatures restore property to loyalists—obviously a provision addressed only to Congress. For a modern example, the Chemical Weapons Convention provides:

Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

(a). Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

. . . ; and

(c). Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, art. 7, ¶ 1, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 317, *available at* <http://www.opcw.org/chemical-weapons-convention/articles/>.

<sup>168</sup> See Vázquez, *supra* note 13, at 616–22.

<sup>169</sup> 27 U.S. (2 Pet.) 253, 314 (1829). For a differing perspective, see David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT'L L.J. 135, 164–71 (2012).

<sup>170</sup> *Foster*, 27 U.S. at 314; see Vázquez, *supra* note 13, at 631–46 (discussing *Foster*).

implement them in domestic law, in part because domestic legal systems vary widely in how treaties are implemented and may have multiple modes of implementation.<sup>171</sup> Importantly, the question of implementation cannot turn on *unilateral* preferences of one treaty party, or even unstated assumptions of both parties. To be part of the treaty, an implementation rule must be part of the contract between nations that the treaty reflects. The mere fact that, for example, U.S. negotiators and ratifiers preferred, assumed, or even announced that the treaty would require congressional implementation would not make that view part of the treaty; it would have to be agreed upon, implicitly or explicitly in the treaty language, by the other party.<sup>172</sup> And if it is not part of the treaty, it is not law (and therefore cannot displace the preemptive effect of the law that the treaty establishes).

Non-self-execution may also arise because the Supremacy Clause's rule is rendered inapplicable or overridden by a provision of U.S. domestic law. Of course, this domestic law provision must arise from the Constitution (else it could not overcome the Supremacy Clause). The Constitution might limit self-execution in at least three ways. First, a particular treaty or treaty provision might be unconstitutional as contrary to another specific provision of the Constitution. It would therefore not be supreme law under the Supremacy Clause, as not "made under the Authority" of the United States.<sup>173</sup> Implementation in this case would require a constitutional amendment. Non-enforcement would not violate (indeed, would be required by) the Supremacy Clause.<sup>174</sup> Second, a treaty provision might be so vague that courts find it unenforceable as beyond their "judicial Power."<sup>175</sup> (This situation thus resembles the case where non-self-execution arises from the treaty's terms: although the treaty is supreme law under the Supremacy Clause, courts cannot use it to decide cases until Congress implements it because it does not supply enforceable rules.) Third, sometimes the Constitution may require an intermediate step before a treaty provision becomes law, regardless of the treaty's terms. For example, the conventional view of Article I, Section 9, stating that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," is that appropriations must be done by statute, not treaty. If so, a treaty purporting to make appropriations would not be supreme law despite the Supremacy Clause's apparently comprehensive rule; the treaty would require implementation by statute, and would properly be described as non-self-executing. In this situation, the specific direction of (for example) Article I, Section 9 would override the general requirement of the Supremacy Clause.

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<sup>171</sup> See generally THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).

<sup>172</sup> See Vázquez, *supra* note 13, at 646–67 (criticizing *Medellin* on this ground).

<sup>173</sup> See RAMSEY, *supra* note 1, at 302–03.

<sup>174</sup> Similarly, federal statutes are not "made in Pursuance" of the Constitution, and thus not supreme law, if they exceed Congress's constitutional powers.

<sup>175</sup> See Vázquez, *supra* note 13, at 629–32 (discussing this situation).

In sum, a treaty may be non-self-executing (meaning not judicially enforceable) either (a) because the treaty parties themselves agree in the treaty that its terms will require legislative implementation, or (b) because another provision of the U.S. Constitution prevents a treaty obligation from becoming judicially enforceable law without further legislative (or constitutional) implementation. Both circumstances are wholly consistent with the Supremacy Clause's text.

This is not to suggest that all modern versions of non-self-execution are consistent with the Supremacy Clause's text. In particular, some modern cases, especially at the court of appeals level, seemingly assume that treaties can become non-self-executing merely because the U.S. negotiators and/or ratifiers thought they would be or should be.<sup>176</sup> That view is not consistent with the Supremacy Clause, but it is also not evidence that the Supremacy Clause's text is unworkable or that its original meaning was anything other than what appears on its face. This loose view of non-self-execution is a relatively recent development, and in particular was not a feature of *Foster*, the Court's only non-self-execution decision dating to anywhere near the Constitution's ratification.<sup>177</sup>

Rather, founding-era evidence suggests that treaty provisions generally were understood to be self-executing. The central point of including treaties in the Supremacy Clause was to automatically override the state treaty violations that plagued the Articles period. Unlike in the case of, for example, presidential policies, the framers specifically concluded that relying on Congress for treaty enforcement by statute was insufficient. Founding-era commentary is replete with statements that under the Constitution treaties would be treated as law like statutes,<sup>178</sup> a point embraced by the Court in *Ware* in 1796.<sup>179</sup> Early nineteenth-century courts consistently enforced treaties over conflicting state law,<sup>180</sup> and, aside from Marshall's opinion in *Foster* (which is consistent with the Supremacy Clause), there is no discussion of non-self-execution.

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In sum, the case for Supremacy Clause textualism appears unshaken by structural and historical objections. As to text, the Supremacy Clause carries a powerful negative implication: by stating in detail what sources of law "shall be" supreme law of the land and capable of displacing state law, it denies that

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<sup>176</sup> See Sloss, *supra* note 5, at 3–6, 12–16 (describing four versions of non-self-execution doctrine, two of which developed after 1960).

<sup>177</sup> Notably, pre-twentieth-century references to non-self-execution are relatively rare, mostly confined to *Foster* and subsequent discussions of that case. *Id.* It is not clear that any nineteenth-century case declined to enforce a treaty solely on non-self-execution grounds. See Vázquez, *supra* note 13, at 601.

<sup>178</sup> See Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1470–72 (2006) (book review) (collecting authorities).

<sup>179</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272, 281, 284 (1796).

<sup>180</sup> See David Sloss, *When Do Treaties Create Individually Enforceable Rights?*, 45 COLUM. J. TRANSNAT'L L. 20, 50–78 (2006) (collecting cases).

others shall obtain that status. Of the three sources the Clause lists, the only one subject to possible ambiguity is "Laws made in Pursuance" of the Constitution; this language standing alone does not specify what actors can "make" supreme law. But taken with other constitutional provisions, it is clear that only laws made by Congress are laws "made" in pursuance of the Constitution. Article I places all legislative (lawmaking) power in Congress, and the other federal branches' powers—defined as executive and judicial—did not encompass lawmaking. In particular, although today we may call judicial application of common law principles "judicial lawmaking," the founding era did not use this terminology, and no one at the time would have thought that common law was law "made" pursuant to the Constitution.

As to drafting history, the Constitution as a whole was a compromise between nationalism and state sovereignty and the Supremacy Clause itself reflected both faces of that compromise. Borrowed from William Paterson's state-oriented New Jersey plan, the Clause was added to the more nationalistic Virginia plan (on the motion of state sovereigntist Luther Martin) to substitute for Madison's idea of giving Congress a "negative" on state laws, which, it was thought, would be too "terrible to the states." The Clause was a profoundly nationalizing principle, compared to the Articles. But only ten days earlier the delegates had approved state control over the Senate, expressly to give states protection from the national government. It could hardly have escaped their notice that the Supremacy Clause required supreme law (other than the Constitution itself) to be approved by the state-controlled Senate—a proposition that fit perfectly with the idea of the Senate as protection for the states. One can imagine the objections, had any delegate proposed at that point that supreme law might come from another source in which the states did not have a voice. Indeed, the delegates voted down Madison's negative as too extreme, even though it would have been exercised *with* approval of the Senate. Thus the drafting history supports the textual reading of the Clause.

Finally, objections based on structural and historical imperatives appear of limited force. To the extent that state interests imperatively must give way to federal interests, there is little reason to suppose that Congress cannot make this happen (and indeed, the greater the structural need, the greater likelihood Congress will act). Immediately after ratification, Congress resolved one of the Articles' great difficulties by protecting ambassadorial immunities in the 1790 Crimes Act.<sup>181</sup> Presumably Congress could have acted to protect federal interests in other areas—such as admiralty or other foreign relations matters—had they been seriously threatened. And post-ratification courts did not see any need to intervene against the states to protect federal interests without an Article VI mandate. Non-Article VI preemption is (with one exception) an artifact of the twentieth century, not of the founding era.

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<sup>181</sup> An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 25, 1 Stat. 112, 117–18 (1790).



The one exception is the law of interstate disputes. Although not traceable fully to the founding era, non-Article VI preemption did appear in interstate disputes prior to the mid-nineteenth century. Moreover, as outlined, structural arguments are much stronger here than in other categories. Nonetheless, this seems a weak basis on which to object to the broader theory of Supremacy Clause textualism. Rather, interstate disputes are best seen as a unique category—properly understood as arising from the Constitution’s text itself, or else as founding error.

#### IV. THE SUPREMACY CLAUSE AND MODERN LAW

This section considers the claim that a strict reading of the Supremacy Clause’s text is fatally inconsistent with modern law. It finds that claim to be true to a limited extent. Some entrenched features of modern law seem difficult if not impossible to reconcile with the Clause’s original meaning. But these inconsistent features are relatively isolated and self-contained. It is not the case that most of modern law is inconsistent with Supremacy Clause textualism or that modern conceptions of law more broadly require rethinking the role of the Supremacy Clause.

##### A. Executive and Administrative Preemption

One apparent inconsistency between the Supremacy Clause and the modern law of executive power is, as discussed above, the potential ability of presidential actions to displace state law.<sup>182</sup> However, aside from the ambiguous opinion in *Garamendi*, the Court’s opinions have only authorized executive preemption in the context of executive agreements. While that power cannot be reconciled with the Supremacy Clause’s text, it can be narrowly described and contained, as indicated by the Court’s recent holding in *Medellin*.

Before *United States v. Belmont* in 1937, the President lacked unilateral power to displace state law, through executive agreements or otherwise.<sup>183</sup> *Belmont* itself recognized its constitutional novelty, casting itself not as a case about presidential power in general, but only as one concerning executive agreements.<sup>184</sup> Such agreements, the Court declared, have the same effect as treaties.<sup>185</sup> Thus the Court tried to reconcile its decision with the Supremacy

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<sup>182</sup> As noted, Professor Monaghan and others suggest that preemption by federal agencies pursuant to broadly worded statutory authority is inconsistent with the Clause’s text. See Monaghan, *supra* note 2, at 756–58. However, that should be understood as a question of non-delegation, not of supremacy.

<sup>183</sup> See Ramsey, *supra* note 95, at 351–52. There is a long history of executive agreements, especially for claims settlement, but prior to *Belmont* none had been given preemptive power. Ramsey, *supra* note 28, at 173–75.

<sup>184</sup> See *United States v. Belmont*, 301 U.S. 324 (1937).

<sup>185</sup> *Id.* at 331–32. *Belmont*’s only material precedent was *B. Altman & Co. v. United States*, 224 U.S. 583, 584–85 (1912). *Altman*, however, involved a congressional–executive

Clause by, in effect, rewriting the Supremacy Clause to include "treaties and other international agreements." Of course the Clause manifestly does not say this, and for good reason: there is an enormous difference, for federalism and separation-of-powers purposes, between a treaty approved by the President plus two-thirds of the Senate and one approved by the President alone.<sup>186</sup>

The Court's 1981 decision in *Dames & Moore* re-characterized executive agreement preemption by linking it not to treaties but to Congress's implied approval.<sup>187</sup> Invoking Justice Robert Jackson's three-part test from *Youngstown Sheet & Tube Co. v. Sawyer*, the Court found executive agreement preemption proper to the extent Congress had not objected to, and thus had seemed to acquiesce in, the practice.<sup>188</sup> This move potentially placed executive agreement preemption on a very narrow ground, for the only substantial past practice had occurred (as in *Belmont*) with claims settlements, and the Court described *Dames & Moore* and the congressional approval with specific reference to claims settlements. But this re-characterization, while keeping executive preemption within narrow limits, did nothing to reconcile it with the Supremacy Clause. Because Congress's purported approval of the practice did not come by statute, but rather was implied from informal practice, it should not have contributed to the agreement's status as supreme law.

Executive preemption then experienced potentially significant broadening and further re-characterization in *American Insurance Ass'n v. Garamendi* in 2003.<sup>189</sup> There the Court seemingly decoupled executive preemption from congressional approval (about which it had relatively little to say in *Garamendi*) and from executive agreements. There were executive agreements tangentially relevant in *Garamendi*, but the Court conceded that these agreements were not themselves preemptive; rather, the executive policy reflected in the agreements was what displaced state law.<sup>190</sup> That result could be read to support "preemption by executive policy" that included but was not limited to executive agreements.<sup>191</sup>

In the next case in this series, *Medellin v. Texas*, the executive branch took the broad view of *Garamendi*: President Bush contended that an executive policy, reflected in a presidential memorandum but not in an executive agreement, displaced state law.<sup>192</sup> The Court disagreed, finding that state law could be displaced only by the Constitution or laws and treaties made in accordance with the Constitution, and that the President, as holder of the

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agreement. While subject to other constitutional objections, see RAMSEY, *supra* note 1, at 148–99, congressional–executive agreements do not raise Supremacy Clause issues.

<sup>186</sup> See Clark, *supra* note 28, at 1581–86.

<sup>187</sup> *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>188</sup> *Id.* at 680.

<sup>189</sup> 539 U.S. 396, 397 (2003).

<sup>190</sup> *Id.* at 416–17.

<sup>191</sup> See Denning & Ramsey, *supra* note 28, at 898–99, 901.

<sup>192</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 15, 25, *Medellin v. Texas*, 552 U.S. 491 (2008) (No. 06-984).

“executive Power,” could not be a lawmaker. The Court read *Garamendi* as confined to executive agreements, placing it squarely in the *Belmont–Dames & Moore* line of cases and denying that it had any application outside that narrow category.<sup>193</sup>

As a result, after *Medellin* modern law can best be described as recognizing a class of executive preemption inconsistent with the Supremacy Clause’s text but limiting that class to executive agreements (perhaps just to executive claims settlements with implicit congressional approval).<sup>194</sup>

### B. Federal Common Law and the Erie Revolution

The modern view of federal common law also may appear inconsistent with the Supremacy Clause’s text, both conceptually and in particular applications. Conceptually, the great potential challenge is *Erie Railroad Co. v. Tompkins*,<sup>195</sup> which altered the longstanding view of federal courts’ common law powers. According to the Court in *Erie*, absent a constitutional provision or statute, federal courts must apply substantive state law; the Court abolished the conceptual category general common law reflected in *Swift* and expressly overruled *Swift*.<sup>196</sup>

*Erie*’s dramatic re-conception of federal judicial power poses tangled questions about federal courts’ common law authority, but its direct effects fall largely in areas that do not implicate the Supremacy Clause. As discussed, *Swift* did not claim common law authority to displace state law.<sup>197</sup> *Swift* only claimed power to use common law principles as rules of decision where state law did not apply. That came to appear problematic because federal courts embraced an unduly broad view of when state law did not apply. *Erie* cut back on this broad view—how much remains debated. But nothing in *Erie* requires that federal courts be given common law preemptive powers that they never had before. To the contrary, because *Erie* was an attempt to rein in federal courts,<sup>198</sup> that would be an odd reading indeed.

Rather, *Erie* raises difficult conceptual problems where federal courts’ application of common law would *not* displace state law. For example, in cases arising abroad or on the high seas, to which state law does not purport to apply,

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<sup>193</sup> *Medellin*, 552 U.S. at 531–32; see Ramsey, *supra* note 22, at 34–37.

<sup>194</sup> A distinct modern doctrine declares that certain state activity in foreign affairs may be precluded by the Constitution itself. *Zschernig v. Miller*, 389 U.S. 429, 436 (1968); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1072–75 (9th Cir. 2012) (en banc). This is not an aspect of executive preemption because it does not depend on a conflict with executive policy. *Cf. Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1063 (9th Cir. 2009) (finding preemption by executive policy), *vacated on granting of reh’g en banc*, 671 F.3d 856 (9th Cir. 2011).

<sup>195</sup> 304 U.S. 64, 78 (1938).

<sup>196</sup> *Id.*

<sup>197</sup> See *supra* Part III.

<sup>198</sup> See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 172 (2000).

can federal courts use international law as a rule of decision (assuming no federal statute or treaty implicated the matter)? Read literally, *Erie* appears to say “no,” because it lists only the Constitution, federal statutes, and state law as available rules of decision.<sup>199</sup> But as discussed, prior to the Constitution English and state courts routinely used international law as a rule of decision; it is hard to understand why the federal courts’ “judicial Power” would not include that authority.<sup>200</sup>

This puzzle, however, does not implicate the Supremacy Clause directly. One might find an indirect implication in two ways. First, *Erie* rested on a broader conceptual change in the nature of law. Adopting the strict positivism associated with Justice Oliver Wendell Holmes,<sup>201</sup> the *Erie* Court argued that all law is “made” by a sovereign power—including common law, which, the Court said, is “made” by courts even if courts purport to “discover” it rather than “make” it. The direct implication of that view is that federal courts under *Swift* were overriding state law even when they claimed they were not: state common law was as much state law as state statutes (“made” by state courts rather than state legislatures). An indirect implication might be that, because we now understand that courts, as well as legislatures, “make” law, law “made” by federal courts in the exercise of their “judicial Power” might be law “made in Pursuance” of the Constitution and thus encompassed by the Supremacy Clause. Thus, one might say, the original meaning of the Clause breaks down as a way of understanding and limiting the common law preemptive powers of the modern federal courts.<sup>202</sup> As Professor Monaghan puts it, it belongs to a “lost world”<sup>203</sup> and cannot be translated into post-*Erie* conceptions.

This argument, however, relies on an ahistorical meaning of “made.” Regardless of how we may now think of it, it is clear that the original meaning of “made” law in Article VI did not include common law deduced by courts from general principles. We can say, for modern purposes, that we now define “made” law to include common law decision-making, but that does not alter or make conceptually incoherent the categories drawn by the framers. The original meaning of the Supremacy Clause is that only laws made by Congress are

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<sup>199</sup> *Erie*, 304 U.S. at 78. *Erie* omitted treaties as governing law, but that was surely inadvertent, as the issue was not raised and there is no reason to suppose that the Court meant to reject the plain text of the Supremacy Clause as to treaties.

<sup>200</sup> See *supra* Part III; RAMSEY, *supra* note 1, at 357–58; see also Bellia & Clark, *supra* note 46, at 659–60.

<sup>201</sup> See *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371–72 (1910) (Holmes, J., dissenting); *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting). As Holmes argued in the latter case, *Swift* was based on the “fallacy” of “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.” *Taxicab Co.*, 276 U.S. at 533. There is, he further declared, “no such body of law. . . . [T]he common law so far as it is enforced in a State . . . [is] not the common law generally but the law of that state.” *Id.*

<sup>202</sup> See Monaghan, *supra* note 2, at 769.

<sup>203</sup> *Id.* at 768.

supreme: that is how the Clause was first drafted,<sup>204</sup> and the final version was revised presumably to save space, not to enlarge the meaning.

In sum, this potential objection to employing the text's original meaning lacks force. The Supremacy Clause's text says that laws *which the founding era defined as "made" law* have supreme status. We know what comprised that category. The fact that we now have chosen also to define some *other* laws as "made" law does not undermine modern application of the original rule, and does not suggest that we now must elevate to preemptive status everything we now call "made" law. Otherwise, the Clause's meaning would bizarrely turn on the fortuity that the framers chose one expression rather than another to signify "laws validly passed by Congress."<sup>205</sup>

A second *Erie*-based challenge to Supremacy Clause textualism runs as follows. Prior to *Erie*, federal courts applied general law (including international law) where state law did not apply. Presumably *Erie* did not mean to abolish this practice, because it was not implicated in *Erie* itself and abolishing it would leave important areas with no rule of decision. But since *Erie* said that law had to be either federal law or state law (not general law), the law applied by federal courts absent state law must be federal law. And if it is federal law, then it must preempt state law, since federal law always preempts state law.<sup>206</sup>

This argument, however, employs an unsound step. Assuming *Erie* meant to allow federal courts to decide according to common law principles absent state law, there is no ground to assume *Erie* meant to make these principles preemptive where state law did apply. The claim that all non-state law applied by federal courts must be preemptive is pure assertion. Prior to *Erie*, federal courts applied a non-preemptive "general" law. Nothing in *Erie* suggests intent to create a new category of preemptive law, and doing so is not a conceptual requirement of *Erie*. Supremacy Clause textualism can easily accommodate this facet of *Erie* by saying that federal courts can apply federal common law principles absent state law but must apply state law (including state common law) where it applies. The objection then becomes that this arrangement is unsound in practice because it allows state law to override (for example) international law. But that appears to be a feature of the original Constitution, not of *Erie*.<sup>207</sup>

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<sup>204</sup> See *supra* Part III.B.

<sup>205</sup> Similarly, it would be odd to say that the Constitution's meaning of "executive" power would change if we now decide to define "executive" power to include the power to make law as needed to manage national emergencies. As Professor Monaghan says, textualism unconnected to the text's historical meaning is an odd interpretive theory because it gives effect to random changes in words' meanings over time. Monaghan, *supra* note 2, at 781. Given this observation, it is not clear that Professor Monaghan contends that *Erie* should be understood to change the meaning of "made" law in the Supremacy Clause.

<sup>206</sup> See Koh, *supra* note 131, at 1831, 1833–34.

<sup>207</sup> See RAMSEY, *supra* note 1, at 358–59.

As a result, *Erie* itself does not appear to pose conceptual challenges to the Supremacy Clause's text. However, federal common law developed after *Erie* does pose practical challenges, described below.

### C. Federal Common Law After *Erie*

Post-*Erie*, the Court has not accepted that case's literal declaration that all rules of decision in federal court must come from state law or from law described in the Supremacy Clause. At the same time, the Court has not accepted academic calls for wide-ranging federal common law.<sup>208</sup> Instead, it has described federal common law as operating narrowly in "enclaves" of "uniquely federal interest."<sup>209</sup> Indeed, judicial preemption through federal common law, as actually practiced by the Supreme Court, can be described—like executive preemption—as confined within a limited scope, although (again like executive preemption) even that limited scope does not seem consistent with the Supremacy Clause's text, and the principles which justify and limit it are not immediately apparent.

#### 1. Admiralty

Several categories of modern common law pose only moderate tension with the Supremacy Clause and allow fairly precise definition. To begin, consider admiralty and maritime law. As discussed, judicial application of non-Article VI common law in admiralty and maritime cases has roots in the founding era in cases such as *Talbot v. Janson*. These cases did not purport to displace state law, as they involved areas where state law did not apply. *Talbot*-type cases thus did not implicate the Supremacy Clause. Displacement of state law in admiralty did not come until much later, in *Jensen* in the early twentieth century.<sup>210</sup> But it is important to see that *Jensen*'s creation of preemptive admiralty law did not rest on broader rejection of the Supremacy Clause's text. In fact, in *Jensen*'s conception, "preemption" is a misnomer. Rather, according to the *Jensen* majority, Article III's grant of admiralty jurisdiction contained a constitutional grant of common law lawmaking power to the federal courts and a corresponding constitutional exclusion of state law to the extent it interfered with the purposes and uniformity of general maritime law.<sup>211</sup> Thus, *Jensen*'s theory was not really one of judicial preemption. Instead, the Court displaced state law, and substituted non-Article VI law, in two steps. First, it envisioned an implied constitutional preemption of the states, akin to the dormant

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<sup>208</sup> E.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 983 (1986); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 806 (1989).

<sup>209</sup> *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); see Tidmarsh & Murray, *supra* note 4, at 594.

<sup>210</sup> See *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

<sup>211</sup> *Id.* at 216–18.

Commerce Clause.<sup>212</sup> Then, with state law displaced by the Constitution, the Court could apply non-Article VI law, in the manner of *Talbot*.

As a theoretical matter, the *Jensen* Court was right to think that this explanation did not contravene the Supremacy Clause. The Supremacy Clause does not deny the possibility of non-Article VI law (so long as it is not applied to displace otherwise-constitutional state law). And the Supremacy Clause does not deny the possibility of implied constitutional exclusions of states from particular fields (it is agnostic, for example, on the question of the dormant Commerce Clause).<sup>213</sup> *Jensen*'s problem, rather, is that its particular constitutional claim is dubious as a matter of text and original understanding. There is no textual reason to read Article III, Section 2's jurisdictional grant of admiralty and maritime jurisdiction as anything more than what it is on its face—simply a jurisdictional grant. Parallel jurisdictional grants are not read so: most notably, diversity jurisdiction was obviously not understood to constitutionally displace state regulation of out-of-state entities. Historical evidence in support of *Jensen* dating to anything near the founding era is negligible. And *Jensen*'s claims regarding the structural imperative of federal uniformity—which seem to be the centerpiece of its reasoning—appear weak at best. In short, Justice Mahlon Pitney's capable dissent has the better of the constitutional arguments.

*Jensen*'s constitutional understanding, although not always explained in detail, permeates modern admiralty decisions.<sup>214</sup> Thus *Jensen* and modern federal admiralty/maritime law do not raise tension with the Supremacy Clause. They may rest on constitutional error, but it is constitutional error about the meaning of Article III, Section 2. More importantly, *Jensen* provides no support for preemptive federal common law in general. It can be understood as a rule arising from a (probably mistaken) view of the constitutional law of admiralty.

## 2. Interstate Disputes

As described above, application of preemptive common law in interstate disputes long predates *Erie*, reaching at least to *Rhode Island v. Massachusetts* in 1838.<sup>215</sup> The same Court that decided *Erie* reaffirmed preemptive common law in interstate disputes in *Hinderlider*, describing it for the first time as

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<sup>212</sup> See *id.* (finding that limitations on state interference with general maritime law were “incorporated into our national law by the Constitution itself” and thus the state law “conflicts with the Constitution”).

<sup>213</sup> But see Strauss, *supra* note 2, at 1584 (suggesting that the dormant Commerce Clause raises tension with the Supremacy Clause).

<sup>214</sup> E.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489–90 (2008) (a “constitutional grant empowered the federal courts . . . to continue the development of [maritime] law” (internal quotation marks omitted)).

<sup>215</sup> See *supra* Part III.C.

"federal common law."<sup>216</sup> Post-*Hinderlider* decisions have continued the practice.<sup>217</sup>

Unlike *Jensen*, neither *Hinderlider* and its predecessors nor the modern law of interstate disputes contains much satisfactory analysis of the source of federal courts' authority to act in these matters. However, if one accepts *Jensen's* reasoning (whether as an original matter or as a matter of stare decisis), parallel reasoning explains the *Hinderlider* line of cases relatively easily. As with admiralty and maritime cases, Article III, Section 2 specifically extends jurisdiction to interstate disputes. Compared to admiralty and maritime cases, the structural imperative for a constitutional exclusion of states asserting the superiority of their law in interstate disputes is much stronger, as is the need for federal courts to supply rules of decision outside Article VI. Thus the best way to understand the apparently non-Article VI law applied in interstate disputes is that it arises from the Constitution itself.

Again, for present purposes it is not especially important whether this is an accurate reading of the Constitution. Rather, the key is that it does not conflict with the Supremacy Clause's text and it does not depend on a broader theory of preemptive federal common law. It can be treated as an isolated phenomenon.

### 3. Immunity of Federal Officials and Institutions

Another doctrine with deep historical roots, sometimes described as a matter of federal common law, is the immunity of federal officials and institutions. Here federal common law seems even more a misnomer: Chief Justice Marshall in *McCulloch* expressly described the Bank of the United States's immunity as arising from the federal law creating the bank, not from common law.<sup>218</sup> This category also can be reconciled with the Supremacy Clause as a matter of statutory preemption: per *McCulloch*, federal law creating federal institutions and offices implicitly creates their immunity.

### 4. Rights and Obligations of Federal Institutions

Shortly after *Erie*, the Court struggled to identify the law governing the rights of federal institutions in commercial matters. Under the old *Swift* system and prior to extensive codification of state law, these rights would have been governed by general common law applied by federal courts (since federal jurisdiction would typically exist). *Erie's* revolution opened the possibility that they would instead be governed by state common law. After initial hesitation, the Court in *Clearfield Trust* found them governed by (preemptive) federal

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<sup>216</sup> *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

<sup>217</sup> *E.g.*, *New Jersey v. New York*, 523 U.S. 767, 811 (1998).

<sup>218</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819); *see also* *Johnson v. Maryland*, 254 U.S. 51, 55 (1920).



common law,<sup>219</sup> restoring something like the pre-*Erie* system (but with state statutes also displaced).

Notably, *Clearfield Trust* described its reasoning somewhat consonant with *Jensen*. The Court explained:

The authority to issue the check [by the United States] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.<sup>220</sup>

This formulation appears to say that state law cannot, as a constitutional or statutory matter, regulate the rights and duties of the United States under commercial instruments issued by the United States. As with *Jensen* (though even more so) that seems difficult to sustain either as a plausible reading of the Constitution or as a necessary implication of the relevant federal statutes.

Modern decisions mark substantial retreat and reformulation. In *O'Melveny & Myers v. FDIC*, the Court instead found state law displaced only in "situations where there is a significant conflict between some federal policy or interest and the use of state law."<sup>221</sup> Although narrower in its displacement of state law, this formulation is more problematic as a matter of the Supremacy Clause, for it suggests that state regulations are generally constitutional except where the Court perceives a conflict with federal "policy" (however that may be defined). That in turn suggests a broader doctrine that allows court-determined federal policy to displace state law generally—a result that would entirely undermine the central federalism protections of the Supremacy Clause.

Nonetheless, *O'Melveny* and related cases need not be read broadly. Most importantly, they can be limited to a specific category—rights and duties of federal institutions. Further, the Court in *O'Melveny* was speaking loosely, because no conflict with any sort of federal policy was at issue. Future cases can clarify that the conflict must arise from a conflict with a federal statute (or treaty), although the conflict might arise from the statute's implication, as in *McCulloch*. So understood, conflict with the Supremacy Clause's text would not arise. In any event, the category is limited and self-contained.<sup>222</sup>

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<sup>219</sup> *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

<sup>220</sup> *Id.* (internal citations omitted).

<sup>221</sup> 512 U.S. 79, 87 (1994) (internal quotation marks omitted).

<sup>222</sup> In contrast, this category would be much less manageable if it is understood as supporting federal common law wherever federal interests require uniformity. See *In re Bernard L. Madoff Inv. Sec. L.L.C.*, 721 F.3d 54, 74 n.24 (2d Cir. 2013) (rejecting argument that federal common law is needed "where the need for uniformity in the treatment of brokerage customers is paramount"); *Parra v. PacifiCare of Ariz., Inc.*, 715 F.3d 1146, 1155 (9th Cir. 2013) (finding that "a generalized desire for uniformity does not suffice to warrant the creation of federal common law").

### 5. Federal Common Law of Foreign Relations

The most difficult category remains. The modern Court has said in recurring dicta that federal common law may govern matters affecting relations between the United States and other nations.<sup>223</sup> This claim poses substantial challenges to any modern implementation of the Supremacy Clause's text. First, as discussed, this category (especially if stated broadly) lacks roots in constitutional text and history.<sup>224</sup> State laws affecting relations between the United States and other nations were not displaced by common law in the early post-ratification period. Second, this category resists re-characterization as constitutionally derived law. The Supreme Court has occasionally indicated or suggested that states are broadly precluded from matters touching on foreign relations, principally in *United States v. Curtiss-Wright Export Co.*<sup>225</sup> and *Zschernig v. Miller*.<sup>226</sup> But both decisions have been strongly criticized as inconsistent with the Constitution's text and original meaning, and neither decision has inspired much doctrinal reliance. The Constitution's text does not indicate that states are precluded generally from matters affecting foreign relations and heavily implies the contrary (especially through Article I, Section 10). Rather, the text's solution to state interference with foreign affairs (a very serious problem under the Articles) appears to be preemption by Congress or by treaty. Third, especially in modern times, the category of matters affecting foreign relations is both wide-ranging and amorphous. A host of apparently local matters may affect U.S. foreign relations, and to say that federal common law potentially governs them is to give federal courts an ill-defined supervisory role over much state law.

A full assessment, however, requires closer examination of what the Court has actually held. Despite broad statements, the Court has only applied preemptive federal common law in foreign relations matters in one area: the act of state doctrine. In the 1897 case *Underhill v. Hernandez*, the Court first concluded that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."<sup>227</sup> This was during the *Swift* era, and *Underhill* did not displace any state statute (indeed, it likely did not displace substantive state common law either, as the state probably did not consider its common law of torts applicable in Venezuela, where the tort occurred). Prior to *Erie*, the Court continued to apply the act of state doctrine in similar circumstances.<sup>228</sup> Although the question never arose, it is doubtful that the Court of the time thought the act of

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<sup>223</sup> E.g., *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

<sup>224</sup> See *supra* Part III.C.

<sup>225</sup> 299 U.S. 304, 318 (1936).

<sup>226</sup> 389 U.S. 429, 436 (1968).

<sup>227</sup> 168 U.S. 250, 252 (1897).

<sup>228</sup> *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309 (1918).

state doctrine was preemptive federal law: in two somewhat cryptic cases, the Court indicated that a closely related common law doctrine, foreign sovereign immunity, was not federal law.<sup>229</sup> Thus the pre-*Erie* Court's approach to both act of state and foreign sovereign immunity appeared consistent with *Swift* and with the Supremacy Clause.

Once *Erie* overthrew *Swift*, the status of the act of state doctrine (and of foreign sovereign immunity) became unsettled for the reasons discussed above. The question arose directly in *Sabbatino* in 1964, where the issue was whether expropriation by the Cuban government in Cuba validly shifted title of disputed goods to Banco Nacional.<sup>230</sup> *Sabbatino* did not directly challenge substantive state law, but it posed the question whether federal courts could invoke a federal version of the act of state doctrine or had to derive act-of-state principles from state law. In finding the matter governed by federal common law, the Court left no doubt that its new muscular version of the act of state doctrine would displace substantive state law to the contrary.

Lower courts and commentators subsequently read into *Sabbatino* a variety of implications, including the idea that all matters implicating relations with foreign governments, and perhaps all matters governed by international law, might be encompassed within preemptive federal common law. The Court itself, however, did not apply *Sabbatino* beyond act-of-state cases. Indeed, in *Zschernig v. Miller*, four years later, the Court passed up an opportunity to use federal common law to preempt a state law that disrupted foreign affairs.<sup>231</sup> Rather, the Court relied on poorly supported (and much-criticized) constitutional arguments.<sup>232</sup> As a result, although the scope of federal common law has been described broadly in this area, the Court's actual application of it has not extended beyond direct conflicts with foreign government action.

That is important for two reasons. First, if viewed in this limited way, *Sabbatino* might be re-described as arising from the Constitution. It seems clear that if *Zschernig v. Miller* was correctly decided, then *a fortiori* *Sabbatino* has similar constitutional authority. *Zschernig*, of course, has very weak textual and historical grounding. It may be, though, that *Sabbatino*—read narrowly—has a stronger claim than *Zschernig*. Foreign sovereign immunity and, to a lesser extent, the act of state doctrine, have historical roots reaching before the founding. The background understanding of the founding era was that misdeeds of foreign governments were not subject to judicial resolution: they were addressed by diplomacy and war. Because Article I, Section 10 precluded states from diplomacy and war (with very limited exceptions), there likely was a background assumption that foreign governments' misdeeds would be exclusively resolved by the federal government. Whether this is sufficient to

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<sup>229</sup> See *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442–43 (1924); *Wulfsohn v. Russian Soviet Federated Socialist Republic*, 266 U.S. 580, 580 (1924) (per curiam).

<sup>230</sup> 376 U.S. 398, 425 (1964).

<sup>231</sup> 389 U.S. 429, 436 (1968).

<sup>232</sup> *Id.*

build a textual/historical case for constitutionally grounded preemptive principles of act of state and foreign sovereign immunity, it is at least more plausible than the broader claim that states are generally precluded from matters affecting foreign relations.<sup>233</sup>

Second, regardless of its constitutional basis, a narrow version of the *Sabbatino* doctrine can be manageably applied without overwhelming the general proposition that federal common law is confined to narrow enclaves. True, it may seem impossible to federalize the act of state doctrine without also federalizing its close cousin foreign sovereign immunity (including head-of-state immunity and other immunities of foreign officials).<sup>234</sup> All of these doctrines implicate claims challenging officials or acts of foreign governments. But at that point it seems possible to draw a reasonably clear line. Claims which do not directly challenge foreign governmental acts or officials are not necessarily implicated by *Sabbatino*'s holding, even if they potentially affect U.S. foreign relations.

### 6. Further Extensions: Boyle v. United Technologies

Since *Sabbatino* in 1964, the Court has clearly extended preemptive federal common law to a new field only once, in the 1988 decision *Boyle v. United Technologies Corp.*<sup>235</sup> *Boyle* illustrates the narrow scope the modern Court accords federal common law. The issue was whether Virginia state tort law could establish a cause of action against a military contractor for negligently designing a helicopter purchased and used by the U.S. military. According to the Court, it could not, on the basis of federal common law.

Three aspects of *Boyle* are especially significant. First, the Court's majority strained to establish a narrow extension of federal common law closely linked to existing categories. It described its holding as a natural consequence of the longstanding immunity of federal officials and institutions. As the Court pointed

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<sup>233</sup> For an expansion of this argument, see Bellia & Clark, *supra* note 60, at 74; Bellia & Clark, *supra* note 127, at 738. For present purposes it does not matter if these arguments are correct; the point here is that they can support a narrow and self-contained view of the federal common law of foreign affairs.

<sup>234</sup> Much of foreign sovereign immunity is now codified in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602–1616 (2012). However, some aspects are not covered by the FSIA. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2281 (2010) (holding that the FSIA does not govern immunities of individual officials). These appear to be matters of federal common law.

<sup>235</sup> 487 U.S. 500, 500 (1988); see also *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009) (applying *Boyle* to claims against U.S. military contractors in Iraq). For discussion of *Boyle* as a contested extension of the “enclaves” of federal common law, see Tidmarsh & Murray, *supra* note 4, at 607–09. Tidmarsh and Murray also discuss another extension: *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 500 (2001) (applying federal common law to question of claim preclusion in federal court). However, it is not clear that this case represents preemption of state law (as opposed to a question of procedure in federal court). See Tidmarsh & Murray, *supra* note 4, at 609–15.

out, if the U.S. military had designed the helicopter, this immunity would have precluded the state law—why should a different rule apply merely because the military chose to shift design responsibilities to a private contractor?<sup>236</sup> The Court carefully resisted general language that would imply broad-ranging federal common law arising from nonspecific federal interests (as contemporary academic writing was advocating).

Second, *Boyle* was a close case with powerful dissents attacking its basic underpinnings. Justices Stevens and Brennan objected to the Court's taking over a role they perceived as lying constitutionally with Congress.<sup>237</sup> And third, *Boyle* has had little subsequent application beyond its overtly narrow holding. The Court has not cited it to support further extensions of federal common law into areas of generic federal interest (in fact, it has been cited for the opposite proposition).<sup>238</sup> *Boyle* is thus consistent with the Court's general modern practice of limiting federal common law to narrow and self-contained fields.

#### D. *Non-self-executing Treaties*

As discussed, a limited version of non-self-execution is consistent with the Supremacy Clause's text.<sup>239</sup> Modern treaty law is, however, problematic in two respects. First, judicial doctrine as reflected in lower court decisions and to some extent confirmed in *Medellin* appears potentially to go further.<sup>240</sup> Second, the President and Senate have developed a practice of declaring treaties non-self-executing.<sup>241</sup>

The modern judicial approach to non-self-execution has rightly been described as confused. With some oversimplification, it appears that lower court decisions have found non-self-execution arising from the intent of the treaty's U.S. drafters and ratifiers.<sup>242</sup> It is not clear whether the Court in *Medellin* endorsed this view. Unfortunately *Medellin* did not approach non-self-execution with the clarity it applied to executive preemption, nor did it attempt to explain its outcome in terms of the Supremacy Clause's text. At times, *Medellin* seemed to adopt at least three different views: (a) that treaties are non-self-executing unless their text indicates otherwise; (b) that treaties are non-self-executing if their text shows an obligation imposed only on Congress; and (c) that, in accord with some lower court doctrine, treaties are non-self-executing if it appears that their U.S. drafters and ratifiers intended them to be.<sup>243</sup>

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<sup>236</sup> *Boyle*, 487 U.S. at 505–06.

<sup>237</sup> *Id.* at 515–16 (Brennan, J., dissenting); *id.* at 531–32 (Stevens, J., dissenting).

<sup>238</sup> *E.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 290 n.24 (2008).

<sup>239</sup> *Supra* Part III.C.

<sup>240</sup> *See* Sloss, *supra* note 6, at 509–14.

<sup>241</sup> Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 408 (2000).

<sup>242</sup> Sloss, *supra* note 6, at 509.

<sup>243</sup> *Id.* at 512–14; *Medellin v. Texas*, 552 U.S. 491, 506–23 (2008).

Of these readings, the first is inconsistent with the Supremacy Clause because if a treaty does not speak to non-self-execution, the Supremacy Clause should supply the default rule under U.S. law. The third is inconsistent with the Supremacy Clause because the President and the Senate cannot give a treaty a meaning it does not have, and—because they alone cannot make Article VI law—they cannot change supreme law to non-supreme law. As discussed, the second reading is consistent in theory with the Clause (a treaty *might* state expressly that its only obligation is on Congress), although in practice treaties generally do not address how domestic law should implement them (that usually being a matter for each individual treaty party). However, some treaties do speak to how they are to be implemented, and if *Medellin* envisioned a relatively limited version of that approach, it should not be seen as a fundamental challenge to the Supremacy Clause.

*Medellin's* reliance on *Foster v. Neilsen* seems to suggest the second reading, as does its extensive emphasis on the treaty's text (in particular, its dispute resolution provisions).<sup>244</sup> If *Medellin* meant only to say that the relevant treaty imposed its obligation on Congress, as a matter of the mutual intent and understanding of the treaty parties as reflected in the text, then the opinion does not pose difficulties for the Supremacy Clause (though one may doubt its conclusion as a matter of treaty interpretation). Nonetheless, *Medellin* did not acknowledge the problem (pointed out in the dissent) that treaties' texts rarely address domestic implementation, nor did it give a satisfactory account of why the text of the treaty at issue reflected agreement among all the treaty parties that the treaty's obligation ran only to Congress. As a result, it arguably stands for a more expansive view of non-self-execution.<sup>245</sup>

Relatedly, since the 1990s the Senate, at the executive branch's invitation, has attached "non-self-executing declarations" to its advice and consent to treaty ratification.<sup>246</sup> While the exact intent underlying these declarations is debated, the general purpose seems to be to deny treaty obligations the status of judicially enforceable law absent implementing legislation. These declarations do not appear limited to, or even targeted toward, situations where implementing legislation is required by the treaty's text or the Constitution. Rather, they seem governed by policy considerations.<sup>247</sup> Although non-self-executing declarations have not been directly tested in the Supreme Court and remain controversial in academic commentary, they are an entrenched feature of political branch practice and the Court appears to assume their validity.<sup>248</sup>

These declarations are difficult to reconcile with the Supremacy Clause. The President and Senate could assure non-self-execution by writing it into the treaty's text—that is, they could make sure the text imposed only an enactment

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<sup>244</sup> See *Medellin*, 552 U.S. at 504–09.

<sup>245</sup> As David Sloss concludes, "*Medellin* seems to provide significant ammunition" for the broader view of non-self-execution. Sloss, *supra* note 6, at 514.

<sup>246</sup> Bradley & Goldsmith, *supra* note 241, at 408.

<sup>247</sup> *Id.*

<sup>248</sup> E.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

obligation on Congress. But if the treaty's text does not contain this qualification, the President-plus-Senate cannot impose it and thereby unilaterally render an otherwise-supreme law non-supreme. Under Article VI's text, the President-plus-Senate can only establish supreme law by agreement with another nation.

In sum, even after *Medellin* non-self-execution doctrine seems radically unsettled. Nonetheless, it is surely right that there are versions of non-self-execution extant in modern practice that cannot be reconciled with the Supremacy Clause's text.

## V. A PATH FOR THE FUTURE

Critics of Supremacy Clause textualism argue that the Supremacy Clause's text cannot be implemented in modern law because the doctrines outlined in Part IV are integral to modern law and cannot be reconciled with the Clause's original meaning.<sup>249</sup> One response might be that if most or all modern doctrines of non-Article VI preemption cannot be reconciled with the Clause's text, the solution is to abandon them in fidelity to the Constitution as written. An alternate approach might attempt to re-conceptualize some modern doctrines of federal common law as having direct constitutional foundations, while abandoning others.<sup>250</sup>

This section sketches a less-drastic alternative that seems closely aligned to the Court's actual course in recent years. It would combine Supremacy Clause textualism with *stare decisis* to preserve but not extend existing inconsistent doctrines. As the preceding Part describes, most or all of the modern doctrines in tension with the Clause's text are (or can be described as) narrow and focused. As such, they allow relatively simple implementation as specific exceptions to a broader rule of Supremacy Clause textualism.<sup>251</sup>

### A. *Medellin* as a Model

Consider again *Medellin*'s approach to executive preemption.<sup>252</sup> The Court faced the executive branch's broad claim that presidential foreign policies, not enacted into law, could displace conflicting state law. The President relied on the longstanding rule that executive agreements displaced state law, together with loose language in *Garamendi* suggesting preemption by other presidential policies. Rejecting the President's claim, the Court invoked arguments

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<sup>249</sup> Monaghan, *supra* note 2, at 763–67.

<sup>250</sup> E.g., Clark, *Federal Common Law*, *supra* note 1, at 1271–1310.

<sup>251</sup> Whether this approach *should* be adopted is beyond the scope of this article. See Strauss, *supra* note 2, at 1592–98 (preferring evolutionary theories of interpretation as a policy matter). The ensuing discussion responds only to the claim that an originalist-textualist version of the Supremacy Clause *cannot* sensibly be implemented consistent with modern law. See Monaghan, *supra* note 2, at 741–42.

<sup>252</sup> *Medellin v. Texas*, 552 U.S. 491, 491 (2008).

consistent with Supremacy Clause textualism: displacing state law was itself a lawmaking act; lawmaking acts were reserved to Congress (or the Senate for treaties) and not within the executive's power.<sup>253</sup> The Court did not explain how to reconcile its rejection of executive lawmaking with the executive agreement cases. It also did not call the executive agreement cases into doubt. Instead, it firmly classed the executive agreement cases as a specific and limited exception which, though not questioned, also would not be extended.

Central to this approach was the Court's treatment of *Garamendi*. *Garamendi* arguably did invite the extension for which the President argued. But the *Medellin* Court expressly denied that *Garamendi* contained any such invitation, describing *Garamendi* (somewhat at odds with the case's actual facts) as purely involving executive agreements. In this way, the Court reconciled constitutional text and the modern law of executive preemption—not by abandoning or re-conceiving either, but by applying the text subject to a limited and specific stare-decisis-based exception.

Because modern preemptive federal common law operates through narrow and defined (or definable) categories, as discussed in Part IV, its textually problematic aspects can be reconciled with Supremacy Clause textualism in this manner. This conclusion should be readily apparent for most categories. The law of interstate disputes may safely be characterized as federal common law, even if that characterization is not fully reconcilable with the Supremacy Clause's text. Interstate disputes are an easily definable self-contained category; recognizing preemptive common law there does not create practical or conceptual problems elsewhere. That is also true of admiralty and of the obligations of federal actors and institutions. Even though these categories may be broader and implicate more federalism concerns, they nonetheless can be described reasonably precisely, and there is no practical or conceptual reason why they cannot be treated as special instances. Indeed, this approach echoes the Court's jurisprudence of "uniquely federal interests," which rests on narrow categorical descriptions of when federal common law can be recognized.<sup>254</sup>

Two areas require further discussion. First, the federal common law of foreign relations, as sometimes applied in lower courts and loosely described in the Supreme Court, does not fit this model well, because it is not a well-defined and self-contained category. Many state laws implicate foreign relations to some degree, and despite some broad language no one has suggested a categorical exclusion. Rather, the suggestion is that courts can displace state laws that *unduly* interfere with foreign affairs. But the contours and even existence of this displacement authority are highly unsettled. Second, the doctrine of non-self-executing treaties, as applied in the lower courts and arguably as embraced in *Medellin*, similarly does not fit the model. It is not

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<sup>253</sup> *Id.* at 526–28.

<sup>254</sup> *E.g.*, *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *see* *Tidmarsh & Murray*, *supra* note 4, at 594. In contrast, arguments based on generalized "need for uniformity" in interstate or international transactions or activities would not fit this model, because the category is neither narrow nor capable of reasonably precise definition.



consistent with the Supremacy Clause's text or a stare-decisis-grounded categorical exception. The next sections address these two areas of concern.

### B. *Re-thinking the Federal Common Law of Foreign Relations*

The current scope of the federal common law of foreign relations is unsettled in the lower courts, with some decisions and commentary taking very broad views of when federal interests might displace state law.<sup>255</sup> *Sabbatino* indicates that some state laws may be displaced by federal foreign policy interests, and subsequent decisions have deeply entrenched *Sabbatino*. At the same time, it seems difficult to re-conceptualize the field to rest directly on the Constitution. *Zschernig*, the case that most closely resembles that project, is not a happy precedent for establishing a workable approach. Thus this area appears to support the contention that modern law cannot be understood or applied consistent with Supremacy Clause textualism.

This article's proposed approach offers a workable solution which would closely parallel the Court's treatment of executive agreements in *Medellin*. First, it would find that non-Article VI judicial displacement of state law to protect federal foreign policy interests conflicts with the Supremacy Clause's original meaning, just as non-Article VI executive displacement of state law to protect federal foreign policy interests conflicted with the Supremacy Clause in *Medellin*. Second, it would acknowledge that *Sabbatino* and subsequent cases have entrenched the modern proposition that the federal act of state doctrine displaces state law (just as *Dames & Moore* and related cases entrenched the proposition that some executive agreements displace state law). Third, it would describe the *Sabbatino* line of cases as resting on a narrow proposition confined to the traditional version of the act of state doctrine: challenges to foreign governments' official acts done within their own territories are subject to federal common law (at the expense of state law). This description echoes *Medellin*'s confinement of *Dames & Moore* and related cases to preemption by formal executive agreement.

Describing *Sabbatino* this way would not depend on (a) finding *Sabbatino* consistent with the Constitution's text or (b) concluding that the best reading of *Sabbatino* is a narrow one. As to the first point, it may be possible to re-conceptualize *Sabbatino* as constitutionally mandated, as Professors Bellia and Clark argue, but doing so may stretch the Constitution's text in other directions and in any event is unnecessary. The proposed approach is overtly a fusion of original meaning and stare decisis; it does not require original meaning justifications for entrenched features of modern law. *Medellin*'s narrow description of *Garamendi* did not depend on an original meaning justification

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<sup>255</sup> See Koh, *supra* note 131, at 1830–41 (arguing for a broad federal common law of foreign relations that includes all of customary international law); Goldsmith, *supra* note 4, at 1625–41 (criticizing lower court decisions expanding the federal common law of foreign relations); see also *Tex. Indus.*, 451 U.S. at 641 (in dicta, describing the category in potentially broad terms).

for preemptive executive agreements; it simply acknowledged that they are entrenched.

As to the second point, *Sabbatino* surely could be read to imply much more than the preemptive effect of the traditional act of state doctrine (just as *Garamendi* could be read to imply more than the preemptive effect of executive agreements). But neither the Supremacy Clause's original meaning nor respect for modern law's entrenched features requires going beyond a narrow description of the case. The only fully entrenched part of *Sabbatino* (or *Garamendi*) is the core holding. It is true that the Court has loosely described federal common law as extending to matters implicating relations with foreign nations.<sup>256</sup> But, aside from *Sabbatino* and related act-of-state cases, these descriptions have been remote dicta, arising in cases that did not implicate foreign affairs, and often in cases rejecting proposed applications of federal common law. The Court has not actually applied foreign-relations-driven common law to displace state law beyond the act of state doctrine. The only entrenched feature of modern law here is the preemptive act of state doctrine, not the broader controversial idea that federal common law has sweeping preemptive effect in foreign affairs. Just as *Medellin* resisted extending executive preemption from executive agreements to executive policy, the proposed approach would resist extending the federal common law of foreign relations beyond direct challenges to foreign official action.

In fact, the Court has already made a significant step, largely unacknowledged, in this direction. In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*,<sup>257</sup> the Court specifically resisted executive branch attempts to broaden the act of state doctrine to bar claims that might complicate U.S. foreign policy by embarrassing foreign governments. *Kirkpatrick* involved a suit between two private U.S. companies, one of which alleged that the other wrongfully obtained a contract with the Nigerian government by bribing Nigerian officials. The Court held that the suit could proceed, despite a risk of embarrassing the Nigerian government if bribery was found to have occurred. First, the Court held that the traditional act of state doctrine did not bar the suit because the suit did not challenge acts of the Nigerian government. Although the suit sought damages for bribery from the private party, it did not ask that the contract award be overturned. Second, the Court insisted that it would only apply the traditional version of the act of state doctrine, despite executive branch arguments that the doctrine reflected a broader policy of barring suits that might embarrass foreign governments. Thus the Court refused to consider whether the consequences to U.S. foreign policy of adjudicating the bribery claim should bar the suit.<sup>258</sup>

*Kirkpatrick* remains underappreciated in the debate over preemptive federal common law because it involved federal rather than state claims and thus had

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<sup>256</sup> E.g., *Tex. Indus.*, 451 U.S. at 641.

<sup>257</sup> 493 U.S. 400, 400 (1990).

<sup>258</sup> *Id.* at 405.

nothing directly to say about the Supremacy Clause. But its message is consistent with the approach suggested here, and contrary to arguments for a broader federal common law of foreign affairs. *Kirkpatrick* read *Sabbatino* only to authorize application of the traditional act of state doctrine, not as an invitation to create federal common law in areas arguably raising similar policy concerns. That view of *Sabbatino* should carry over to applications of federal common law that implicate the Supremacy Clause, for there (unlike in *Kirkpatrick*) federalism provides further reason to avoid non-Article VI lawmaking.

In sum, under the proposed approach the federal common law of foreign relations is a misnomer. The entrenched modern rule is (only) that federal common law may displace state law for claims challenging the validity of foreign governmental acts done in the foreign nation's own territory—the classic formulation of the act of state doctrine. The Court expressly and categorically resisted expanding the act of state doctrine to areas that may raise similar policy concerns but lie outside the traditional formulation. The proposed approach would accept the limited formulation of preemptive federal common law as a matter of stare decisis but not extend it, just as *Medellin* accepted preemptive executive agreements as a matter of stare decisis but did not extend it to encompass preemption by executive foreign policy.

### C. *The Future of Non-self-execution*

The framework developed here also suggests a way to approach treaty non-self-execution. First, the judicial doctrine of non-self-execution appears too unsettled to command stare decisis respect, except for the abstract proposition that *some* treaty provisions are not part of judicially enforceable supreme law absent implementing legislation. This general proposition is consistent with the Supremacy Clause's text, if limited to treaty provisions that (a) are addressed only to Congress as a matter of the treaty's text, or (b) require implementing legislation as a matter of other constitutional provisions. Second, these features can explain the outcome in *Medellin*. Although there are various ways to read *Medellin*, it can be understood to find a non-self-execution directive in the treaty's text. Further, while the Court did not address the question directly, it faced a situation in which a self-executing obligation might have been unconstitutional. The treaty at issue obligated the United States to implement a judgment of the International Court of Justice (ICJ). The ICJ judgment in turn passed upon the meaning of a U.S. treaty, the Vienna Convention on Consular Relations. If the ICJ judgment was self-executing, that would make the ICJ the final judicial arbiter of the meaning of a provision of U.S. law. Arguably a treaty constitutionally cannot delegate this authority to a non-Article III court.<sup>259</sup> That conclusion might suggest that the treaty language should, if

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<sup>259</sup> Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 7–8 (2006).

possible, be read to avoid self-execution. And that in turn might explain why the *Medellin* Court found the treaty's text to require non-self-execution even where treaties rarely do so and the particular treaty did not appear to do so expressly.<sup>260</sup> In sum, the scope of non-self-execution appears to remain an open question, so there is no conceptual or practical objection to resolving it in accordance with the Supremacy Clause's text.

Of greater concern, the political branches have an entrenched practice of non-self-executing declarations that cannot easily be squared with the Supremacy Clause's text. Perhaps political branch practice cannot command stare decisis effect. In that case, one might conclude not that Supremacy Clause textualism is unworkable under modern law but that a particular feature of modern political practice is unconstitutional (hardly a novel result).<sup>261</sup> Alternatively, an accommodation of modern practice as establishing a constitutional custom might recognize non-self-executing declarations as an exception, in accordance with Justice Frankfurter's view in *Youngstown* that practice can provide a "gloss" on the Constitution's meaning.<sup>262</sup>

The latter solution has several things to recommend it. The point of including treaties in Article VI was surely that, in the ordinary course, treaty compliance was so important that congressional implementation should not be required before treaties could be enforced judicially. Accepting non-self-executing declarations would confirm that general conclusion, while also accepting that in particular cases the combined judgment of the President and the Senate might be that other factors outweigh the imperative of judicial enforcement. Limiting non-self-execution to express Senate declarations would confine the category in a precise and easily administrable way, without requiring political judgment by the courts. Finally, the flexibility conveyed to the political branches by this approach might actually result in the United States adopting more treaties. If the Senate were barred from non-self-executing declarations, it might instead simply decline to consent to the treaty in question.

## VI. CONCLUSION

Professor Henry Monaghan's elegant *Supremacy Clause Textualism* centrally argues that the text of Article VI, as originally understood, cannot explain much of modern supremacy law nor provide a coherent guide to future adjudication in the area. More broadly, his article invokes supremacy issues as

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<sup>260</sup> See Sloss, *supra* note 6, at 513 (suggesting that constitutional concerns may have influenced *Medellin*'s outcome).

<sup>261</sup> See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (finding legislative veto unconstitutional despite widespread and longstanding political branch practice).

<sup>262</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412 (2012) (discussing constitutional custom). For discussion of non-self-executing declarations, see Vázquez, *supra* note 13, at 670; Bradley & Goldsmith, *supra* note 241, at 404–23.

evidence that what he calls “originalism-driven textualism” generally is not a useful guide for modern interpretation. This article has sought to defend the Supremacy Clause’s text against these charges.

The defense rests centrally on precisely describing Supremacy Clause textualism and precisely describing modern law. Supremacy Clause textualism requires that federal interests can displace state law only when federal interests are incorporated into one of the three forms of law set forth in Article VI: the Constitution, federal treaties, and federal statutes. It also requires that federal interests that *are* incorporated into Article VI law displace state laws and interests (an uncontroversial point when applied to the Constitution and statutes but contentious when applied to treaties).

So described, Supremacy Clause textualism does not implicate several other difficult fields with which it is sometimes associated. It says nothing about the ability of Article VI law to delegate preemptive lawmaking authority to non-Article VI actors. For example, whether Congress can delegate preemptive lawmaking power to agencies or courts is a matter of the non-delegation doctrine; whether the Constitution’s open-ended provisions can be read to delegate preemptive lawmaking authority to courts is a matter of constitutional theory. Further, the Supremacy Clause says nothing about federal courts’ ability to apply non-Article VI law where it does not displace state law. The Supremacy Clause is only about the relationship between federal interests and state law. Where state law does not apply, federal courts’ ability to find or make non-Article VI law is a matter of Article III judicial power, not of the Supremacy Clause.

Even with Supremacy Clause textualism precisely described, some entrenched features of modern law pose substantial tension with it. However, these features are not so widespread or as conceptually challenging as often supposed. With respect to preemption by the executive branch (or administrative agencies), the only substantial tension appears to be executive agreements. Ordinary administrative preemption is done pursuant to statutory delegation, and the Supreme Court in *Medellin* resisted presidential preemption beyond executive agreements. With respect to judicial preemption, the Court has applied preemptive federal common law in a few defined areas, not all of which are easily reconciled with the Supremacy Clause: in particular, admiralty, interstate disputes, rights and obligations of federal institutions, and the act of state doctrine. However, the Court has resisted an open-ended federal common law urged by some academic authorities, instead insisting that federal common law exists only in limited “enclaves.”

Further, although questions of preemptive federal common law sometimes become entangled with the mysteries of *Erie Railroad Co. v. Tompkins*, they should not be. *Erie* does not do anything directly to authorize non-Article VI preemptive law (rather, its focus was to cut back on federal interference with state law); *Erie*’s broader re-conceptualization of common law as “made” rather than “found” should not confuse the fact that when Article VI referred to law

“made in Pursuance” of the Constitution, it meant statutory law, not law “discovered” (as it was then understood) by judges.

Finally, the modern doctrine of non-self-executing treaties raises tension with the Supremacy Clause’s nationalist side by suggesting that some Article VI law is not fully preemptive. However, the existence of some “non-self-executing” features of treaties is consistent with the Supremacy Clause: for example, if a treaty’s text expressly addresses itself only to Congress, or if undertaking or enforcing its obligations would be unconstitutional, the Supremacy Clause does not require (or allow) displacement of state law. Broader versions of non-self-execution doctrine remain deeply controversial and thus are not entrenched features of modern law. At most, one could recognize a narrow exception based on modern political branch practice, accepting Senate declarations of non-self-execution; this narrow category would be administrable and would not undermine a broader implementation of the Supremacy Clause in controversies where it did not apply.

Thus this article concludes that some aspects of modern law are inconsistent with the Supremacy Clause’s text but these aspects are (or can be) described as limited self-contained exceptions. A combination of Supremacy Clause textualism and stare decisis can provide a practical reconciliation of modern law and the Clause’s original meaning. The Supreme Court’s approach to presidential preemption provides a model. In *Medellin*, the Court applied a view of executive power consistent with Supremacy Clause textualism, concluding that the President’s executive power precluded presidential lawmaking, and insisting that to be preemptive, presidential policies had to be implemented through Article VI law. The Court acknowledged that prior cases had given preemptive effect to executive agreements, in tension with this description of executive power. But it confined these cases expressly to executive agreements, declining the President’s invitation to apply them more broadly. The *Medellin* model allows reconciliation not only of the executive preemption cases, but also of the question of preemptive federal common law. As described, the entrenched instances of federal common law are narrowly described and self-contained, and thus can be applied as stare-decisis-driven exceptions to Article VI’s text in the same way as *Medellin* applied executive agreements as a stare-decisis-driven exception to limits on presidential preemption.

Applying this model points the way to future resolution of the two most confused areas of law in this field: the federal common law of foreign affairs and the doctrine of non-self-executing treaties. A broad view of the federal common law of foreign affairs cannot be grounded upon either the Supremacy Clause’s text or entrenched features of modern law. The only common law rule in the foreign affairs areas with entrenched preemptive force is the act of state doctrine, reflected in *Sabbatino* and related cases. Despite some loose language, the Court has never applied foreign-relations-driven common law to displace state law in any other context, and in *Kirkpatrick* it specifically resisted expanding the act of state doctrine to fields with arguably similar policy considerations. Thus the *Medellin* model suggests that exceptions to Supremacy

Clause textualism in foreign affairs should be limited to claims challenging the validity of foreign governments' territorial acts (the classic formulation of the act of state doctrine endorsed in *Sabbatino's* holding); further displacement of state law, to the extent thought necessary to the conduct of foreign relations, can be implemented by Congress.

As to non-self-execution, this model suggests that it can be limited to the two categories where non-self-execution is consistent with the Supremacy Clause: treaties that by their text only impose obligations on Congress, and treaties that the Constitution precludes from being applied directly in court. This limitation does not violate entrenched law, because there is little entrenched law—non-self-execution is recognized as a category but its contours are deeply disputed. The proposed limit accords with the conventional explanation of the Court's seminal non-self-execution decision, *Foster v. Neilsen*, in which Chief Justice Marshall said that the treaty itself directed its obligations to Congress. Further, it can explain the non-self-execution result in *Medellin*. Although *Medellin's* reasoning is subject to various interpretations, some quite expansive, the original meaning/stare decisis model requires a narrow description. *Medellin's* non-self-execution can be explained on two grounds. First, *Medellin* can be read to find the non-self-execution direction in the actual text of the relevant treaty. This may not be the most persuasive reading of the treaty, but that is not a matter of constitutional dimensions. Second, *Medellin* involved a peculiar circumstance of a treaty delegating adjudication authority over federal law to a non-Article III court, namely the ICJ. If the ICJ decision were given preemptive effect by making the treaty self-executing, substantial constitutional questions of delegation (having nothing to do with the Supremacy Clause) would be raised. Although the *Medellin* Court did not put it this way, it may be that these constitutional questions encouraged the Court to avoid giving the treaty self-executing effect.

Consequently, this article concludes that Supremacy Clause textualism can be reconciled with modern law with the addition of a narrow version of stare decisis. Indeed, this appears to be the modern Court's approach both with respect to executive preemption in *Medellin* and generally with respect to preemptive federal common law (although not, as yet, non-self-executing treaties). Applied to existing uncertainties, this model points the way for both the federal common law of foreign affairs and non-self-executing treaties by insisting that preemption be consistent either with Article VI's text or with modern law's entrenched features. This test would limit the preemptive federal common law of foreign relations to suits challenging the validity of foreign territorial acts of state (and would, for example, resist an expansive application of non-statutory foreign official immunities). It would similarly resist a broad application of the non-self-execution doctrine, instead insisting that non-self-execution arise only where it is indicated by the treaty's text or a specific constitutional provision, or, at most, where the political branches specifically directed it through a non-self-execution declaration by the Senate. Taken as a

whole, this approach not only provides a text-based explanation of modern law but also charts a path for the future.